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A Second Look at Amended Rule 11

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A Second Look at Amended Rule 11

Keywords

Federal Rules of Civil Procedure in 1993, Rule 11 Before the 1993 Amendments

A SECOND LOOK AT AMENDED RULE 11

THEODORE C. HIRT*

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INTRODUCTION

As part of the Judiciary's ambitious reform of many of the Federal Rules of Civil Procedure in 1993, the sanctions provisions of Rule 11 (the "Rule") were amended substantially.¹ Even though the core principle of Rule 11 remains the same—that litigants, whether acting *pro se* or through counsel, must present accurate and nonfrivolous assertions of fact and law in their written filings with the district court²—the Rule's substantive provisions have been altered significantly. Although the changes to the Rule, which were effective on December 1, 1993, have received some attention in writings by practitioners and academics, they largely have been overshadowed by far more controversial amendments that have imposed the duty of "mandatory disclosure" on civil litigants and changed the rules governing civil discovery.³ Those changes attracted a "firestorm" of controversy and criticism by many practitioners, legal commentators, and even some judges. Several members of the Supreme Court dissented when the Court transmitted the amendments to Congress in April 1993. Afterwards, Congress made a nearly successful effort to prevent the amendments from going into effect in December 1993.⁴ Despite the relative lack of attention that Rule 11 has received, its amendments deserve closer examination, particularly now that almost six years have passed since they went into effect.

First, this Article describes the 1993 amendments to Rule 11, including the debate that preceded those amendments, and the various predictions made concerning their potential effects upon the practice of civil litigation. Second, this Article discusses how the Rule has operated since it became effective on December 1, 1993. Third, this Article suggests how litigators may use the Rule effectively in initiating or defending against sanctions motions. This Article concludes that the changes to the Rule, and its recent application, may provide broader lessons for the rules amendment process in

1. See FED. R. CIV. P. 11.

2. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) ("[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts.").

3. See FED. R. CIV. P. 26(a)(1)-(4) (modifying pre-existing discovery rules by imposing duties of initial disclosure as to the identity of certain witnesses and documents); see *infra* note 21.

4. See *infra* notes 82-102 and accompanying text.

general.⁵

I. RULE 11 BEFORE THE 1993 AMENDMENTS

Rule 11, adopted as part of the original 1938 Federal Rules of Civil Procedure, “consolidated and unified” two previous Equity Rules—Rule 24 on “Signature of Counsel” and Rule 21 on “Scandal and Impertinence.”⁶ Rule 11 was designed “to check abuses in the signing of pleadings.”⁷ In 1983, the Rule was amended based on the Judiciary’s determination that the Rule had not been effective in deterring abuses of the litigation process. This non-effectiveness was partially attributed to confusion about when the Rule could be invoked, what standards of conduct were expected of attorneys who signed pleadings, and what sanctions were available under the Rule.⁸ The amendment expanded the authority of the courts to impose

5. The Rules Enabling Act provides that the Supreme Court may “prescribe general rules of practice and procedure and rules of evidence” for cases in the district courts and the courts of appeals. *See* 28 U.S.C. § 2072(a) (1994). Pursuant to that Act, the Judicial Conference has the authority to “prescribe and publish the procedures” for the consideration of such rules, including the appointment of a “standing committee on rules of practice, procedure, and evidence,” and other committees to advise on rules changes. *See id.* § 2072. These committees are to be composed of “members of the bench and the professional bar, trial and appellate judges.” *Id.* § 2073. By law, the Supreme Court must transmit any proposed rules changes to Congress by May 1 of the year in which the changes are to become effective. *See id.* § 2074(a). If Congress fails to act, the rules become effective no earlier than December 1 of the year in which the proposed changes are transmitted. *See id.* § 2074.

6. *See generally* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190-93 (1988) (discussing the history of Rule 11 prior to its amendment in 1983).

7. FED. R. CIV. P. 11 advisory committee’s note (1983) (amended 1993), *reprinted in* 97 F.R.D. 165, 198 (1983). The Advisory Committee on Civil Rules publishes, with each proposed rule change, a commentary (“Notes”) explaining the proposed change. *See id.*, *reprinted in* 97 F.R.D. 165, 198 (1983). The Notes appear with the published rules and are often cited by courts in interpreting the meaning and application of the rules. *See, e.g.*, *Business Guides v. Chromatic Communications Enters.*, 498 U.S. 533, 551 (1991) (examining the Notes when interpreting the 1983 version of Rule 11); *Cooter & Gell*, 496 U.S. at 393 (describing the history of Rule 11).

8. *See* FED. R. CIV. P. 11 advisory committee’s note (1983) (amended 1993), *reprinted in* 97 F.R.D. 165, 198 (1983) (noting that “the amended rule attempts to deal with the problem of deterring abuses”); *see also Cooter & Gell*, 496 U.S. at 393 (recognizing that the Advisory Committee intended “[t]o ameliorate these problems”). Many authors have discussed the inadequacies that plagued the original Rule 11. *See* Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 F.R.D. 383, 386-88 (1995) (discussing the inadequacies of the original rule); Byron C. Keeling, *Toward a Balanced Approach to “Fivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1074-77 (1994) (noting that “[a] prominent factor in the disuse of Rule 11 was the language requiring a subjective intent to abuse the judicial process”); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 186-87 (1985); Scott Nehrbass, Comment, *The Proposed Amendment to Federal Rule of Civil Procedure 11: Balancing the Goal of Deterrence with Considerations of Due Process and Fairness*, 41 U. KAN. L. REV. 199, 201 (1992) (stating that “[t]he original version of the Rule was a total failure [because] [i]n its first [45] years of existence, the Rule produced only nineteen motions, and even then violations were found only in cases of extreme and obvious bad faith conduct”).

monetary sanctions, including attorneys' fees.⁹ The 1983 amendment "was intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions."¹⁰ The Advisory Committee Notes explained that "[g]reater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."¹¹

By the late 1980s, however, there had been considerable criticism of the Rule's operation. For example, some asserted that the Rule had a "chilling effect" on advocacy, particularly on the ability of counsel to advance novel theories of recovery or legal contentions.¹² Others asserted that the Rule had a disproportionate impact on plaintiffs' counsel, particularly in civil rights litigation.¹³ Some commentators criticized the Rule as generating a veritable "cottage industry" of sanctions practice, spawning satellite litigation that was encouraged by the Rule's provisions, which authorized litigants to recover attorneys' fees for pursuing sanctions motions.¹⁴ Others expressed concern that the Rule reduced civility among counsel.¹⁵

9. See *infra* note 27 and accompanying text.

10. FED. R. CIV. P. 11 advisory committee's note (1983) (amended 1993), *reprinted in* 97 F.R.D. 165, 198 (1983) (citation omitted).

11. *Id.*, *reprinted in* 97 F.R.D. 165, 198 (1983).

12. See Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365 (1989) ("An attorney who fears personal sanctions for presumed shortcomings in scholarship is not apt to be adventurous in his client's behalf."); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 984-85 (1992) (concluding that "all will suffer" if the Rule "stifle[s] the creativity of litigants in pursuing novel factual or legal theories"); Jeffrey M. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-V verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 259 (1991) (noting that Rule 11 "discouraged innovative lawyering"); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 483-86 (1991) (asserting, based upon analysis of statistics, that defendants used the Rule to chill plaintiffs' access to the courts); Nehrass, *supra* note 8, at 207 (noting that Rule 11 encourages lawyers to "play it safe"); *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1642-44 (1994) [hereinafter *Developments*] (noting that one study found that more than 20% of the lawyers interviewed "did not assert a potentially meritorious claim").

13. See Marshall et al., *supra* note 12, at 965-67 (discussing the results of a multi-circuit survey revealing that although civil rights cases accounted for only 11.4% of federal cases, 22.7% of the federal cases in which sanctions were imposed were civil rights cases); *Developments, supra* note 12, at 1643-44 (citing a Federal Judicial Center study showing that civil rights cases represent a disproportionately high number of the federal cases in which sanctions were imposed).

14. See Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 173-74 (1994) (noting statistics on growth in Rule 11 practice); Vairo, *supra* note 6, at 197-202 (discussing the growth of Rule 11 sanctions and the problems associated with it); Nehrass, *supra* note 8, at 206 ("Rule 11 spawned an avalanche of litigation.").

15. See Elson & Rothschild, *supra* note 12, at 365 (discussing the "erosion of civility"); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 334 (1992) (noting survey findings on civility); Marshall et al., *supra* note 12,

Empirical studies also were conducted on the Rule's operation.¹⁶ In July 1990, the Advisory Committee on Civil Rules (the "Committee"), recognized the Rule's numerous criticisms and invited comments to amend the Rule.¹⁷

In August 1991, the Committee published, for comment, extensive proposed amendments to a number of the Civil Rules, including Rule 11. The Committee ultimately held two public hearings on the proposed amendments¹⁸ and later explained that it had issued its proposal based on the conclusion that "the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit."¹⁹ Specifically, the Committee commented that there was support for the following propositions:

(1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing

at 964 (presenting statistics that confirm this finding); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 326-31 (1990) ("Rule 11 really is largely a form of escalation, a cutthroat tactic in the struggle over the merits.").

16. See FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583 (1993); Hess, *supra* note 15, at 314 (noting that from 1983-1991 there were more than 150 law journal articles and at least eight empirical studies conducted about the Rule); Marshall, *supra* note 12, at 949-85 (presenting results of a survey of various circuit and district courts); Nehrbass, *supra* note 8, at 204 n.37 (discussing a 1991 study by the Federal Judicial Center).

17. See *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 335, 350-59 (1990) [hereinafter *Call for Written Comments*]; see also Letter from the Honorable Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to the Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), *reprinted in* 146 F.R.D. 519, 519 (1993) [hereinafter *Transmittal Letter*] (transmitting proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and accompanying Committee Notes).

18. See *Proposed Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence*, *reprinted in* 137 F.R.D. 53 (1991); *Transmittal Letter*, *supra* note 17, *reprinted in* 146 F.R.D. 519, 519 (1993) (noting that hearings were held in California and Georgia).

19. *Transmittal Letter*, *supra* note 17, *reprinted in* 146 F.R.D. 519, 519 (1993).

with such motions has not been insignificant.²⁰

In conjunction with the controversy raised by the proposed disclosure rules and associated changes to the rules governing discovery,²¹ the amendments to Rule 11, ultimately approved in 1993, were the product of extensive analysis and debate. Before discussing that controversy, including the predictions made as to how amended Rule 11 would affect civil practice, Part II will describe the principal amendments to Rule 11 that were made effective December of 1993.²²

20. *Id.*, reprinted in 146 F.R.D. 519, 523 (1993).

21. The debate over initial disclosure under Rule 26(a)(1) and the associated changes in the discovery rules have been discussed extensively and will not be reviewed here. *See, e.g.*, Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39-46 (1992) (critiquing the automatic disclosure requirement as based on flawed assumptions about the nature of civil litigation); Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 307-10 (1994) (detailing the debate); Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179, 198-220 (1994) (discussing the negative effects of the 1993 mandatory disclosure amendments); John C. Koski, *Mandatory Disclosure: The New Rule That's Meant to Simplify Litigation Could Do Just the Opposite*, A.B.A. J., Feb. 1994, at 85, 87; Linda A. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 823-30 (1991) (concluding that one commentator's criticism of disclosure "amounts to egregious over reaction"); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing,"* 46 HAST. L.J. 679, 721-28 (1995) (tracing the history of Rule 26(a) from its proposal by the Advisory Committee to the Supreme Court's approval); Frank W. Hunger & Cynthia C. Lebow, *The Civil Justice Reform Act and the Rulemaking Process: Where Do We Go From Here?*, FOR THE DEF., Sept. 1995, at 8, 11 (concluding that the ability to opt out of Rule 26 has resulted in "nothing short of chaos"); Fred S. Souk, *No Disclosure!—No Discovery!—No Nonsense! Faster, Cheaper, Better Civil Justice*, FOR THE DEF., Sept. 1995, at 28, 29 (criticizing the Civil Justice Reform Act and the 1993 Amendments to the Federal Rules of Civil Procedure and proposing a "simplified civil justice reform plan"). In 1998, the Advisory Committee proposed for comment further amendments to the disclosure rules. *See* Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, 181 F.R.D. 18, 57 (1998); Terry Carter, *The Latest Discovery Mission*, A.B.A. J., Sept. 1999, at 20, 20 (discussing the proposed changes); *Rule 26 To Be Altered, Applied Universally*, FEDERAL DISCOVERY NEWS, May 1998, at 1 (discussing ongoing work by the Advisory Committee to modify Rule 26(a)(1)); Ruth E. Piller, *Suggested Rules Seek to Develop a Kinder, Gentler—and Cheaper—Discovery Process*, LITIG. NEWS (ABA LITIG. SEC.), July 1998, at 1.

22. *See Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 404 (1993). The Supreme Court's April 22, 1993 Order stated that the amendments would "take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." *Id.* This Article does not discuss the ramifications of applying amended Rule 11 to such pending cases, principally because that category of cases is likely to be relatively small, and will disappear over time. Some appellate courts remanded rulings applying the 1983 version to district courts for consideration of the impact of the 1993 amendments, but indicated that it would not be equitable to impose the standards of amended Rule 11 on litigants for conduct that occurred prior to December 1, 1993. *See* *Knipe v. Skinner*, 19 F.3d 72, 77-78 (2d Cir. 1994) (stating that it would be "just and practicable" to give the district court the opportunity to apply its discretion in whether to apply sanctions, but on remand the court otherwise should apply the version of the Rule in effect at the time of the sanctions ruling, since any further retroactive application of the Rule would charge the person with knowledge of a rule not in effect at the time, and thus would not advance Rule 11's "central goal of deterring baseless filings").

II. FEATURES OF THE AMENDED RULE

Amended Rule 11 “retains the principle that attorneys and *pro se* litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1.”²³ As discussed below, however, the amendments reflect a shift in judicial philosophy on the goal of the sanctions, the appropriateness of sanctions, and how sanctions are to be imposed.²⁴

A. *Sanctions Are Discretionary With the Court*

One of the principal changes made in the amended Rule is that the imposition of sanctions by the court is now discretionary, rather than mandatory. Former Rule 11(b) stated that if a pleading, motion, or other paper were signed in violation of the Rule, the court “upon motion or upon its own initiative, *shall* impose” upon the person or party “an appropriate sanction.”²⁵ Although a court had the discretion to determine *what* sanction to impose, a court did not have the discretion to determine *whether* a sanction should be imposed once the Rule had been violated.²⁶ Rule 11(c) now states that if the court determines that the Rule has been violated, it *may* impose “an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.”²⁷

23. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 584 (1993).

24. *See id.*, *reprinted in* 146 F.R.D. 583, 584 (1993) (“The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.”).

25. *See* FED. R. CIV. P. 11(b) (1983) (amended 1993), *reprinted in* 97 F.R.D. 165, 197 (1983) (emphasis added).

26. *See, e.g.*, *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986) (discussing the drafters’ intention to create a more stringent Rule imposing affirmative duties on counsel to investigate allegations of law and fact).

27. The change from “shall” to “may” represents a return to the pre-1983 version of the Rule, which had conferred discretion on the courts whether or not to impose sanctions. When the Rule was amended in 1983, the Advisory Committee emphasized that “the words ‘shall impose’ . . . focus the court’s attention on the need to impose sanctions for pleading and motion abuses.” FED. R. CIV. P. 11 advisory committee’s note (1983) (amended 1993), *reprinted in* 97 F.R.D. 165, 200 (1983). The Advisory Committee added that courts would retain “the necessary flexibility to deal appropriately with violations of the rule.” *Id.*, *reprinted in* 97 F.R.D. 165, 200 (1983). The court would also have “discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.” *See id.*, *reprinted in* 97 F.R.D. 165, 200 (1983). In 1992, the Advisory Committee recommended retention of the mandatory imposition of sanctions, in view of the new safe harbor procedure. *See* Transmittal Letter, *supra* note 17, *reprinted in* 146 F.R.D. 519, 524 (1993) (believing safe harbor provisions give alleged violator opportunity to escape mandatory sanctions); *see also infra* note 52 and accompanying text. The Standing Committee, however, decided to make the imposition of sanctions discretionary. *See Excerpt From the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, 146 F.R.D. 515, 517 (1992).

B. New Standards of Liability

Under Rule 11(b), the signer of a pleading or other filing provides several certifications to the court. First, the signer certifies that, “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,”²⁸ the pleading or written filing is “not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”²⁹ Second, the signer certifies that “the claims, defenses, and other legal contentions” in the filing “are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”³⁰ Third, the signer represents that the allegations and factual contentions “have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”³¹ Finally, the signer certifies that “denials of factual contentions are warranted by the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”³²

In contrast, the 1983 version of the Rule applied a somewhat more subjective standard—“that to the best of the signer’s knowledge, information and belief formed after reasonable inquiry,” the paper was “well grounded in fact and is warranted by existing law or a *good faith* argument for the extension, modification, or reversal of existing law”³³ Amended Rule 11(b)(2) and (3) thus modify the standard by which assertions of law and fact will be evaluated, enhancing the objective nature of the litigant’s pre-filing inquiry and responsibility. Similarly, under the new Rule 11(b)(4), a litigant certifies that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”³⁴

The Advisory Committee Notes emphasize that attorneys and *pro se* litigants are required “to conduct a reasonable inquiry into the law

28. FED. R. CIV. P. 11(b)(1).

29. *Id.*

30. FED. R. CIV. P. 11(b)(2).

31. FED. R. CIV. P. 11(b)(3).

32. FED. R. CIV. P. 11(b)(4).

33. FED. R. CIV. P. 11(a) (1983) (amended 1993) (emphasis added). As the Second Circuit has noted, the amended language “broad[ens] the scope of the obligation to refrain from advancing baseless factual or legal contentions,” while placing “greater constraints” on issuing sanctions. *See O’Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir. 1996).

34. FED. R. CIV. P. 11(b)(4). New subsection 11(b)(4) was added along with 11(b)(3) to the Rule to “equalize the burden of the rule upon plaintiffs and defendants” FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 586 (1993).

and facts before signing pleadings The rule continues to require litigants to ‘stop-and-think’ before initially making legal or factual contentions.”³⁵ Although the 1983 Rule also required an objective, rather than subjective (“good faith”) standard for liability,³⁶ the amended Rule is even clearer. The new standard, according to the Advisory Committee Notes, is “intended to eliminate any ‘empty-head pure-heart’ justification for patently frivolous arguments.”³⁷

The amended Rule does preserve the opportunity for a party to support its legal theories with “minority opinions, . . . law review articles, or through consultation with other attorneys, . . .” and does not require the party to state specifically that it is asserting an argument for a change in the law.³⁸ “A contention that is so identified,” however, “should be viewed with greater tolerance under the rule.”³⁹

C. *What Kinds of Statements Are Sanctionable?*

Until the 1993 amendments, the litigant’s certification of the accuracy of his or her pleading statement was evaluated as of its submission date.⁴⁰ Under the amended Rule, litigants have a responsibility to reevaluate earlier written representations to the court. Rule 11(b) now states that a litigant, “[b]y presenting to the court (whether by signing, filing, submitting, or *later advocating*) a pleading, written motion, or other paper,” thereby is certifying to the accuracy of, or support for, the statements within it.⁴¹ A litigant’s responsibility for such statements, therefore, is no longer completely “static” in nature, but has become more of a continuing duty. As the Advisory Committee Notes explain, “[A] litigant’s obligations with respect to the contents of [its] papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in

35. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 584-85 (1993).

36. *See, e.g.,* *Business Guides v. Chromatic Communications Enters.*, 498 U.S. 533, 554 (1991) (affirming imposition of sanctions where the party “failed to conduct a reasonable inquiry before signing”).

37. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 586-87 (1993); *see also* *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329-30 (2d Cir. 1995) (“The new version of Rule 11 makes it even clearer that an attorney is entitled to rely on the objectively reasonable representations of the client.”).

38. *See* FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 587 (1993).

39. *Id.*, *reprinted in* 146 F.R.D. 583, 587 (1993).

40. *See* *Smith v. Our Lady of Lake Hosp., Inc.*, 960 F.2d 439, 444 (5th Cir. 1992) (stating that the Rule 11 reasonableness standard is reviewed “according to the ‘snapshot’ rule, focusing upon the instant the attorney affixes his signature to the document”); *Hillsborough County v. A & E Road Oiling Serv., Inc.*, 160 F.R.D. 655, 659 (M.D. Fla. 1995).

41. *See* FED. R. CIV. P. 11(b) (emphasis added).

[them] after learning that they cease to have any merit.”⁴² The Notes explain, however, that the Rule does not cover “matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection.”⁴³

For example, an attorney who advocates a previously pleaded claim or a defense during a pretrial conference is “presenting to the court” that contention and therefore, is subject to potential sanctions by asserting that claim or defense at the conference.⁴⁴ The oral reaffirmation of a prior written statement is within the scope of the Rule.⁴⁵

Further, under the amended Rule, sanctions can be imposed for even a single specific misstatement of law or fact within a pleading, because the Rule addresses violations in, *inter alia*, claims, defenses, contentions, allegations, or denials.⁴⁶ The Advisory Committee, while declining to amend the Rule to incorporate an alternative standard under which a court would issue a sanction only if the paper, evaluated “as a whole,” violated Rule 11, explained that the safe harbor procedure in amended Rule 11(c)(1)(A), which permits litigants to withdraw challenged pleadings, would reduce the number of Rule 11 motions filed.⁴⁷ Furthermore, the Advisory Committee

42. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 585 (1993).

43. *Id.*, *reprinted in* 146 F.R.D. 583, 585 (1993) (characterizing the Rule as applying only to “assertions contained in papers filed with or submitted to the court”).

44. *See id.*, *reprinted in* 146 F.R.D. 583, 585 (1993).

45. *See O’Brien v. Alexander*, 898 F. Supp. 162, 175-76 (S.D.N.Y. 1995) (holding that statements made during oral arguments that restated and advocated the sufficiency of allegations in the complaint were sanctionable under Rule 11(b)), *aff’d in part and rev’d in part*, 101 F.3d 1479 (2d Cir. 1996).

46. *See* FED. R. CIV. P. 11(b)(2)-(4); *see also* *Burnette v. Godshall*, 828 F. Supp. 1439, 1447-48 (N.D. Cal. 1993) (“Sanctions shall be imposed whether the pleading or motion is frivolous in whole or in part.”), *aff’d sub nom.* *Burnette v. Lockheed Missiles & Space Co., Inc.*, 72 F.3d 766 (9th Cir. 1995); Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 504-05 (1990) (listing cases dealing with “whole document” issue).

47. *See* Transmittal Letter, *supra* note 17, *reprinted in* 146 F.R.D. 519, 524 (1993). As the Advisory Committee stated in its Transmittal Letter to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States:

The Advisory Committee continues to believe that the “stop-and-think” obligations apply to all of the allegations and assertions, not just to a majority of them. Nevertheless, the language of the published draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subsection (b) to eliminate the specific reference to a “claim, defense, request, demand, objection, contention, or argument” and has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared—or threatened—for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the safe harbor provision, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.

Notes explain that sanctions should not be pursued for minor or inconsequential violations⁴⁸ and stipulate that one factor courts should consider is “whether [the improper conduct] infected the entire pleading, or only one particular count or defense.”⁴⁹

D. Inapplicability of the Rule to Discovery Disputes

Rule 11(d) now states that the Rule does not apply to “disclosure and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.”⁵⁰ The Advisory Committee Notes explain that Rules 26(g) and 37 establish their own certification standards and sanctions and therefore, it is more appropriate that those discovery rules, rather than Rule 11, govern litigants’ conduct.⁵¹

E. The Safe Harbor

A central change in the Rule is the so-called safe harbor provision of Rule 11(c)(1)(A), which gives putative violators the opportunity to withdraw challenged papers.⁵² The party who asserts a Rule 11 violation does not immediately file a Rule 11 motion; in fact, the party *cannot* do so.⁵³ Instead, the party *serves* the motion, and then must give the opposing party twenty-one days to withdraw the challenged misrepresentation.⁵⁴ Rule 11(c)(1)(A) states that the motion “shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.”⁵⁵ Moreover, the motion for sanctions “shall be made separately from other motions or requests,” and “shall describe the specific conduct” alleged to violate the Rule.⁵⁶

The safe harbor provision gives an alleged violator an opportunity to withdraw the statement challenged as inaccurate and to avoid the

Id., reprinted in 146 F.R.D. 519, 524 (1993).

48. See FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 590 (1993) (stating that Rule 11 motions should not become a legal device for “intimidat[ing] an adversary into withdrawing contentions that are fairly debatable”).

49. FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 590 (1993).

50. FED. R. CIV. P. 11(d).

51. See FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 592 (1993) (explaining that Rules 26 to 37 are specifically designed for the discovery process).

52. See FED. R. CIV. P. 11(c)(1)(A).

53. See *id.*

54. See *id.*

55. *Id.*

56. See *id.*

sanctions that otherwise would be sought once the motion was filed. A party will not be subject to sanctions “unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.”⁵⁷ The Advisory Committee Notes explain that “[u]nder the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”⁵⁸ Under the amended Rule, on the other hand, the party gains protection from sanctions when it timely withdraws the contention.⁵⁹

F. Accountability for Violations of the Rule

Amended Rule 11(c) states that the court may impose an appropriate sanction “upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.”⁶⁰ This is an expansion in liability from the previous version of the Rule. Prior to this amendment, attorneys who were affiliated with the violator, but who had not signed the paper at issue, were not held responsible for the Rule 11 violations.⁶¹ Under the amended Rule, there is now the potential for expanded liability. Although the person signing or advocating the paper at issue has a “nondelegable responsibility to the court, and in most situations, is the person to be sanctioned” under the Rule, the Advisory Committee Notes state that a law firm, “[a]bsent exceptional circumstances,” “is to be held also responsible when . . . one of its partners, associates, or employees is determined to have violated the Rule.”⁶² Because of the safe harbor provision, courts may expect supervising attorneys, such as law firm partners, to evaluate whether to withdraw the offending paper. If the supervising attorneys decline to do so, they must risk facing the consequences. The Advisory Committee Notes conclude that in this situation law firms are to be considered “jointly responsible under established principles of agency.”⁶³

A court, therefore, may specifically inquire into whether such

57. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 591 (1993).

58. *Id.*, *reprinted in* 146 F.R.D. 583, 591 (1993).

59. *See id.*, *reprinted in* 146 F.R.D. 583, 591 (1993).

60. FED. R. CIV. P. 11(c).

61. *See Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 124-27 (1989) (holding that the purpose of Rule 11 is to make the individual signer responsible); *Triad Sys. Corp. v. Southeastern Exp. Co.*, 64 F.3d 1330, 1339 (9th Cir. 1995) (applying the *Pavelic & LeFlore* rule that “[o]nly the individual attorney who actually signed the court paper could be sanctioned because of its contents”).

62. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 588 (1993).

63. *Id.*, *reprinted in* 146 F.R.D. 583, 589 (1993).

additional entities, such as the law firm, co-counsel, or the party itself, should be subject to sanctions in addition to the individual who signed the pleading, or “in unusual circumstances, instead of,” the signer of the pleading.⁶⁴ The Advisory Committee Notes state that “such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.”⁶⁵

G. *Limitations on Available Sanctions*

The amended Rule contains important limitations on the types of sanctions that can be imposed, and the specific purposes these sanctions serve. First, Rule 11(c)(2) explicitly directs that “[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.”⁶⁶ The Rule thus directs courts to evaluate what sanctions will deter such conduct in the future. The former version of the Rule did not set forth such an explicit standard.⁶⁷

Under Rule 11(c)(2), a sanction “may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.”⁶⁸ Through this amended language, the Rule now expresses a preference for the imposition of either non-monetary sanctions *or* monetary sanctions that are paid to the court.⁶⁹

64. *See id.*, reprinted in 146 F.R.D. 583, 589 (1993).

65. *Id.*, reprinted in 146 F.R.D. 583, 589 (1993).

66. FED. R. CIV. P. 11(c)(2). As the 1993 Advisory Committee Notes state, a court “has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.” FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 587 (1993).

67. *Compare* FED. R. CIV. P. 11 (1983) (amended 1993) (stating that if “a pleading, motion, or other paper is signed in violation of [Rule 11], the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction,” but failing to specify a standard for the court to use when making its determination), *with* FED. R. CIV. P. 11 (c)(2) (implementing the “sufficient” deterrence standard).

68. FED. R. CIV. P. 11(c)(2).

69. The Committee explains that:

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person

This alteration marks a pronounced and deliberate deviation away from the Rule's function as a fee-shifting mechanism.⁷⁰

A second change involves a represented party's potential liability for monetary sanctions. Under the former Rule, either the party or the attorney could be liable for misrepresentations of fact or law.⁷¹ Under amended Rule 11(c)(2)(A), monetary sanctions for violations of Rule 11(b)(2), involving frivolous contentions of law, cannot be imposed upon a represented party.⁷² Instead, as the Advisory Committee Notes emphasize, the responsibility for such sanctions is "more properly placed solely on the party's attorneys."⁷³ A party, however, remains responsible and subject to sanctions for unwarranted factual contentions or improper conduct under Rule 11(b)(1), (3), or (4).⁷⁴

H. *The Court's Authority to Impose Sanctions Sua Sponte*

Prior to the 1993 amendments, Rule 11 was not clear whether a court, *sua sponte*, could impose sanctions on a violator of the Rule and if so, whether due process requires a court to provide prior notice of its intent to do so, in order for the litigant to defend itself against a potential sanction.⁷⁵ Amended Rule 11(c)(1)(B) explicitly states that

violating the rule to make a monetary payment, but also directs that some or all of the payment be made to those injured by the violation.

FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 587-88 (1993).

70. See Transmittal Letter, *supra* note 17, *reprinted in* 146 F.R.D. 519, 524 (1993) (stating the Committee's intent to emphasize that "cost-shifting awards should be the exception, rather than the norm, for sanctions").

71. See FED. R. CIV. P. 11 (1983) (amended 1993) ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . .").

72. See FED. R. CIV. P. 11(c)(2)(A).

73. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583, 589 (1993) (stating that courts retain the power to impose sanctions, such as dismissal of a claim, that will have "collateral financial consequences" upon a party).

74. See *Union Planters Bank v. L & J Dev. Co., Inc.*, 115 F.3d 378, 384-85 (6th Cir. 1997) ("Rule 11 explicitly allows for the imposition of sanctions upon a party responsible for the rule's violation, provided that a represented party is not sanctioned for a violation of subsection (b)(2) involving unwarranted legal contentions.").

75. In *Merriman v. Security Ins. Co.*, 100 F.3d 1187 (5th Cir. 1996), the court stated as follows:

In the Rule 11 context, due process demands only that the sanctioned party be afforded notice and an opportunity to be heard. What constitutes sufficient process depends on the circumstances of each case The notice required depends on the conduct sanctioned by the court. An attorney who files court papers with no basis in fact needs no more notice than the existence of Rule 11 itself. However, where a party files papers in court without any basis in *law*, due process requires specific notice Due process does not demand an actual hearing. In Rule 11 cases, the opportunity to respond through written submissions usually constitutes sufficient opportunity to be heard.

Id. at 1191-92 (citations omitted); see also *Simmerman v. Corino*, 27 F.3d 58, 62-64 (3d Cir. 1994) (holding that the district court abused its discretion by imposing sanctions *sua sponte* on

courts do have the authority to impose sanctions *sua sponte*.⁷⁶ Although the Rule does not describe the factors a court may use to impose sanctions, the Advisory Committee Notes state that such sanction orders “will ordinarily be issued only in situations that are akin to a contempt of court.”⁷⁷

Prior to imposing sanctions, however, the court must issue a “show cause” order to give the alleged violator the opportunity to demonstrate why its conduct does not violate the Rule.⁷⁸ By its terms, the Rule does not guarantee the violator the opportunity to avoid sanctions even if it immediately withdraws the challenged representation. The exception to this principle is in Rule 11(c)(2)(B), which states that monetary sanctions cannot be imposed on the court’s initiative, unless the “court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.”⁷⁹ The Advisory Committee Notes state that the “corrective action” of withdrawing the challenged paper in response to the show cause order “should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant’s response, the court concludes that a violation has occurred.”⁸⁰ Because the Rule explicitly preserves the court’s authority to impose sanctions, the safe harbor provision is a limited refuge for the alleged violator.⁸¹ Thus, although the amended Rule may insulate an attorney from opposing counsel’s attack, the Rule will not necessarily preclude the court from imposing sanctions.

an attorney more than three months after the conclusion of a case, and that a party is entitled to particularized notice when a court is considering the imposition of sanctions); *Pan-Pacific & Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594, 597 (9th Cir. 1993) (stating that party being investigated is entitled to “1) notice that the court is considering sanctions against it, and 2) an opportunity to be heard in opposition,” but not a second hearing on the matter).

76. See FED. R. CIV. P. 11(c)(1)(B).

77. See FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 592 (1993).

78. See FED. R. CIV. P. 11(c)(1)(B) (“On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.”).

79. FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 592 (1993) (“Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case.”).

80. *Id.*, *reprinted in* 146 F.R.D. 583, 592 (1993).

81. See FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583, 592 (1993) (explaining that there is no safe harbor where the court has issued a show cause order on its own).

III. THE DEBATE OVER THE PROPOSED AMENDMENTS

After the then-proposed amendments to Rule 11 were made public in August 1991, they incited substantial debate and significant criticism.⁸² As described below, the criticisms essentially have been that the Rule's ability to deter sanctionable conduct would be weakened, and that the amended Rule would not penalize such conduct sufficiently in practice.

First, the Committee's proposal to make the imposition of sanctions discretionary with the court drew strong criticism. Opponents argued that the change would suggest to judges that enforcing the Rule was not an important priority, which would lead to the imposition of fewer sanctions.⁸³ The effect of the change would be to excuse sanctionable conduct, rather than to punish it. Making sanctions discretionary would impair the Rule's effectiveness,⁸⁴ reducing a party's incentives to seek sanctions against a litigant who had presented frivolous papers.⁸⁵ Why should counsel assume the burden to assert and establish a violation, if the court could decline to take action, no matter how serious the violation? Others expressed concern that the grant of discretion would create inconsistencies in the imposition of sanctions.⁸⁶

82. See generally Christopher R. Hedican & Timothy D. Loudon, *The 1993 Amendments to the Federal Rules of Civil Procedure: Their Anticipated Impact on Employment Litigation*, 28 CREIGHTON L. REV. 997 (1995); Jeffrey A. Parness, *The New Federal Rule 11: Different Sanctions, Second Thoughts*, 83 ILL. BAR. J. 126 (1995) [hereinafter Parness, *The New Rule 11*]; Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for The "Stop-and-Think-Again" Rule*, 1993 B.Y.U. L. REV. 879, 887-88, 902 [hereinafter Parness, *Fines*]; Sidney Powell & S. Ann Saucer, *Revised Rule 11: Is it Safer?*, 15 MISS. C. L. REV. 271 (1995); Howard A. Cutler, Comment, *A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMPLE L. REV. 265 (1994). The principal criticisms are summarized in the Advisory Committee's May 1, 1992 transmittal of the proposed amendments to the Standing Committee. See Transmittal Letter, *supra* note 17, reprinted in 146 F.R.D. 519, 523-25 (1993) (summarizing main criticisms that the Advisory Committee has received, including that the amendment will reduce the number of Rule 11 motions and the severity of the sanctions).

83. See *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 507, 508 (1993) (Scalia, J., dissenting) (observing that judges, "like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession"). Justice Scalia reasoned that judges would not see the "system-wide benefits of serious Rule 11 sanctions" although they would be aware of the expenditure of time to consider and apply sanctions in their own cases. See *id.* He concluded that it was "important to the effectiveness of the scheme that the sanctions remain mandatory." *Id.* Efforts to block the amendments in Congress ultimately proved unsuccessful. See Tobias, *supra* note 14, at 187-88 (describing the events).

84. See Cutler, *supra* note 82, at 267 ("By providing greater discretion to district court judges, the new rule will promote inequitable decisions. Since each judge brings his or her own experiences and perspectives to the bench, uniform interpretations of Rule 11, and corresponding predictability of results for litigants, are virtually impossible.") (citation omitted).

85. See *id.* at 290 (suggesting that by limiting the award of attorneys' fees as a sanction, the Rule would discourage litigants from attempting to enforce Rule 11).

86. See *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 507, 508 (1993) (Scalia,

Substantial criticism also was directed at the safe harbor provision, based on the premise that the availability of the procedure would lead litigants to be more cavalier about their fact investigations and legal research because they could withdraw a challenged written representation with impunity.⁸⁷ Some counsel might manipulate the Rule, pursuing frivolous arguments in papers and then withdrawing them, thereby wasting the opponents' time and diverting them from other litigation tasks.⁸⁸

Critics also predicted that the amended Rule would be much less effective due to its shift in emphasis from compensation and fee shifting to deterrence of future misconduct.⁸⁹ There would be fewer party-initiated sanctions due to the safe harbor provision and the reduced likelihood of recovering attorneys' fees.⁹⁰ As a result, otherwise sanctionable conduct would not be remedied.⁹¹ Although the reduction in counsel-initiated sanctions would be offset substantially by court-initiated sanctions proceedings, there still would be fewer violations of the Rule addressed under the amendment.⁹² Some commentators predicted that the amended Rule

J., dissenting).

87. See Cutler, *supra* note 82, at 267, 287-88. The safe harbor provision, however, could benefit litigants whose advocacy might otherwise be improperly "chilled" by the prospect of sanctions against them. See *id.* (noting that under the 1983 amendment, the threat of monetary sanctions may have deterred litigants from bringing a claim).

88. See Theodore J. Hamilton, *The 1993 Amendments to the Federal Rules of Civil Procedure: How The Changes Will Affect Your Life*, 68 FLA. B. J. 36, 38 (1994) ("This ability to withdraw the frivolous document may lead to additional filings of such documents to see if the documents will draw a Rule 11 objection."); Cynthia A. Leiferman, *1993 Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger?*, 29 TORT & INS. L. J. 497, 501-06 (1994) (asserting that the deterrence factor behind Rule 11 has been decreased by the 1993 amendments, particularly in terms of the safe harbor provision); Christopher D. Wolek, Comment, *Practice and Procedure: The "Safe Harbor" Amendment to Rule 11 . . . Any Port in a Storm?*, 47 OKLA. L. REV. 319, 343, 354 (1994) (suggesting that the safe harbor provision be conditioned upon limited use by the litigant). One commentator suggests that some attorneys might inappropriately invoke the safe harbor provision by "bas[ing] notice of potential violations on the refined parsing of a paper or questionable challenging of a factual contention which might ultimately have evidentiary support," thereby making the "targets unnecessarily expend substantial resources in order to respond within three weeks." See Tobias, *supra* note 14, at 207 (arguing that the safe harbor provision may shift the focus to an attorney's tactics and away from substantive issues).

89. See Cutler, *supra* note 82, at 267, 290 (suggesting that by reducing the compensation of attorneys' fees, litigants will be less likely to use Rule 11, thereby reducing its power of deterrence).

90. See *id.* (asserting that these provisions do not provide sufficient incentives for litigants to pursue Rule 11 sanctions). But see *Developments, supra* note 12, at 1641 (concluding that although some litigants "on the margin" may now refrain from filing motions for sanctions, discretionary rather than mandatory sanctions will have little effect on the sanctions process followed under the 1983 version).

91. See Cutler, *supra* note 82, at 267 (cautioning that unless courts' enforcement of Rule 11 increases, the likelihood of parties' non-compliance with Rule 11 will increase).

92. See Parness, *The New Rule 11, supra* note 82, at 126-27 (noting that the purpose of the safe harbor provision is to allow parties to correct possible violations and thereby decrease

would create substantial amounts of “satellite litigation,” at least in the short term.⁹³ There would be an expanding number of proceedings devoted to testing and applying the Rule’s new features, including the safe harbor provisions.⁹⁴ This would defeat one of the amendment’s purposes—to simplify the Rule and to decrease such collateral proceedings.⁹⁵ One group expressed concern that if any individual factual or legal allegation could be the subject of sanctions, instead of reviewing the pleading “as a whole,” there would be more “satellite litigation” than under the current Rule.⁹⁶ There also was substantial criticism of the amendment’s shift away from the “snapshot” rule of evaluating a pleading only when signed, even though the Advisory Committee’s imposition of a “continuing duty” was mitigated by the limitation that it applied only to the continued “advancing” of a legal or factual contention.⁹⁷

Although there have been many criticisms of the proposed Rule, there has been strong support to reform Rule 11 and to adopt certain amendments proposed by the Committee.⁹⁸ A group of federal

ancillary litigation).

93. See Cutler, *supra* note 82, at 292-93 (predicting that ancillary litigation will probably increase after the 1993 amendment as it did after the implementation of the 1983 amendment); *Developments, supra* note 12, at 1638-42 (explaining that the “increased potential for satellite litigation is substantially vitiated by the newly created twenty-one day safe harbor provision”).

94. See *Developments, supra* note 12, at 1639-40 (discussing the prospect for the 1993 amendments to Rule 11 increasing the potential for satellite litigation).

95. See Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67, 78-79, 89 (1997) (discussing the changes to the 1983 version of the Rule and recommending repeal of the safe harbor provision, because if its repeal “does not actually reduce frivolous lawsuits, [it] would at least eliminate the public perception of attorneys filing frivolous lawsuits with impunity, as long as they withdraw the case during the twenty-one days”).

96. The *Bench-Bar Proposal to Revise Civil Procedure Rule 11* explains:

We are drowning in Rule 11 satellite litigation now. Once we start litigating whether par. 3 of the complaint should have been amended because of the answer of X at p. 1352, l.6, of the deposition, or whether part IV.B of the motion for summary judgment was to change or extend existing law, we will never find court time to try a case.

Bench-Bar Proposal to Revise Civil Procedure Rule 11, 137 F.R.D. 159, 163 (1991) [hereinafter *Bench-Bar Proposal*]; see also Hess, *supra* note 15, at 356-57 (predicting that a broader scope expanding the certification standard for bringing Rule 11 motions under the 1991 proposal would also increase tension between the parties and reduce creative advocacy).

97. See Kimberly A. Stott, *Proposed Amendments to Federal Rules of Civil Procedure 11: New, But Not Necessarily Improved*, 21 FLA. ST. U. L. REV. 111, 132-33 (1993) (arguing that this provision may easily be abused and noting the heavy burden placed on lawyers working on multiple cases at once).

98. See Powell & Saucer, *supra* note 82, at 290 (“The new and improved Rule 11 eliminates many of the old Rule’s incentives to accuse opposing counsel of sanctionable conduct and escalate the acrimonious character of litigation.”); Stott, *supra* note 97, at 116 (“The proposed amendments adequately address many complaints about Rule 11 and may streamline the process of seeking sanctions. However, the imposition upon lawyers of a continuing duty to comply with Rule 11 may undermine the drafters’ purpose in amending the rule.”); Tobias, *supra* note 14, at 214 (“The 1993 revision of Rule 11 substantially improves upon the 1983 version, which proved to be highly controversial and very difficult to implement.”); James R.

judges and practitioners offered a proposal that would have amended the Rule to a lesser extent.⁹⁹ Their proposal would have made sanctions discretionary, and it would have required that all monetary sanctions be paid to the court and “limited to what is sufficient to deter comparable conduct by persons similarly situated.”¹⁰⁰

In May 1992, when it transmitted its proposed amendments to the Standing Committee, the Advisory Committee acknowledged that its proposed amendments, insofar as they added the safe harbor provision and shifted the types of sanctions awarded, in a sense did “weaken[]” the Rule, but contended that the amendments nevertheless were desirable.¹⁰¹ The Committee also stated that various modifications to its initial proposal, made after receiving the comments, responded to some of these criticisms.¹⁰²

IV. EXPERIENCE UNDER THE AMENDED RULE

A. Commentaries and Surveys

When the Advisory Committee transmitted its proposed amendments to the Standing Committee in May 1992, it stated that the objective of the amendments was to “increas[e] the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, [and to] reduc[e] the frequency of Rule 11 motions.”¹⁰³ Has the amended Rule met those

Simpson, Comment, *Why Change Rule 11? Ramifications of the 1992 Amendment Proposal*, 29 CAL. W. L. REV. 495, 513 (1993) (calling the proposal “sound,” in general, and predicting it should decrease sanctions motions while further promoting a more consistent application of the Rule); see also Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 666 (1991) (proposing that although changes to Rule 11 were necessary, they may not sufficiently counteract the negative consequences of the Rule itself); *Developments*, *supra* note 12, at 1651 (“The 1993 Amendments seek to increase the potential deterrence of the Rule, to decrease its satellite litigation, and to reduce the Rule’s chilling effect. Measured against these goals, the Amendments are, on the whole, successful.”).

99. See *Bench-Bar Proposal*, *supra* note 96, at 162-66 (questioning the Advisory Committee proposals and offering an alternative revision for Rule 11). This proposal was submitted by Judge A. Leon Higginbotham, Jr., Third Circuit Court of Appeals, Judge Patrick Higginbotham, Fifth Circuit Court of Appeals, Judge Mary M. Schroeder, Ninth Circuit Court of Appeals, Professor George C. Cochran, University of Mississippi, Francis Fox, Esq., Boston, Massachusetts, John P. Frank, Esq., Phoenix, Arizona, Hugh Jones, Esq., Syracuse, New York, Laura Kaster, Esq., Chicago, Illinois, Jerold S. Solovy, Esq., Chicago, Illinois, Bill Wagner, Esq., Tampa, Florida. See *id.*

100. See *id.* at 165.

101. See Transmittal Letter, *supra* note 17, reprinted in 146 F.R.D. 519, 523 (1993) (addressing the major criticisms of the proposed amendment).

102. See *id.*, reprinted in 146 F.R.D. 519, 525 (1993) (indicating which provisions have been amended in response to the primary criticisms).

103. See *id.*, reprinted in 146 F.R.D. 519, 523 (1993) (maintaining the Advisory Committee’s continued commitment to the purpose of the 1983 amendment while acknowledging the flaws of the 1983 version); Powell & Saucer, *supra* note 82, at 274-75 (noting that the 1993 version places greater constraints on the imposition of sanctions and, at the same time, broadens the

expectations and fulfilled that objective?

To date, there is relatively little academic or practitioner commentary on how the amended Rule operates.¹⁰⁴ There is, however, some "anecdotal" reporting, with some commentators stating that there are fewer sanctions motions filed under the amended Rule.¹⁰⁵ In June 1995, however, the Federal Judicial Center, which is the research, educational, and planning agency of the federal judiciary,¹⁰⁶ conducted a formal survey of judges and attorneys concerning the Rule, with specific questions addressing the implementation of the 1993 amendments.¹⁰⁷ Questionnaires were sent to over 1,000 federal trial attorneys and 148 federal district judges.¹⁰⁸ The survey also asked the respondents' views on then-

scope of counsel's obligations); *see also* Lisa Pondrom, Comment, *Predicting the Unpredictable Under Rule 11(b)(3): When Are Allegations "Likely" to Have Evidentiary Support?*, 43 UCLA L. REV. 1393, 1398-1401 (1996) (discussing the purpose of the Advisory Committee as well as potential problems with the 1993 amendment's implementation).

104. *See* Daniel E. Lazaroff, *Foreword to The Third Annual Fritz B. Burns Lecture on Rule 11 Reform: Progress or Retreat on Attorney Sanctions?*, 28 LOY. L.A. L. REV. 1, 4-5 (1994) (recognizing potential problems with the 1993 version and maintaining that federal courts should follow the intent of the Advisory Committee when making Rule 11 decisions); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 626, 631-42 (1998) (describing several cases decided under the amended Rule) [hereinafter Vairo, *Rule 11 and the Profession*]. Judge William W. Schwarzer and Professor Georgene M. Vairo both gave lectures on April 8, 1994, later published as journal articles, which understandably did not discuss cases decided under the then newly amended Rule. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 2(A)(4), at 22-36 (2d ed. 1996); GEORGENE VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES & PREVENTIVE MEASURES § 2.04[b], at 2-65 (2d ed. 1992); William M. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 12-13 (1994) (supporting the provisions of the 1993 amendment and their effect on professional responsibility); Jerold S. Solovy et al., *Current Developments in Federal Civil Practice: Sanctions Under Federal Rule of Civil Procedure Rule 11*, 583 PLI/LIT 105 (1998) (reviewing cases decided under the amended Rule); Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 52-69 (1994) [hereinafter Vairo, *The New Rule 11*] (concluding that although the 1993 amendments are beneficial overall, Rule 11 continues to impede the independence of lawyers).

105. *See* Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J., Mar. 1995, at 12, 12 (concluding that there has been "a marked decline in reported cases under the new Rule 11, a trend confirmed by interviews with federal judges, lawyers, and law professors"); Jeffrey J. Hunt, *Rule 11 Resurgent? Hefty Sanctions Imposed Against Counsel in Recent Federal Cases*, LITIG. NEWS (ABA LITIG. SEC.), Mar. 1997, at 5 (stating that the 1993 amendments "have resulted in fewer lawyers and clients being sanctioned," but citing several recent decisions that suggest that "judges still are willing to impose hefty sanctions, particularly in the case of frivolous filings or bad faith conduct of counsel"); *Whatever Happened to Federal Rule 11 Motions?*, FEDERAL DISCOVERY NEWS, Mar. 1997, at 6, 6 (citing remarks of Professor Georgene Vairo, Loyola University College of Law, and District Judge Sam C. Pointer, Jr. (N.D. Ala.), former Chair of the Civil Rules Advisory Committee, and District Judge Thomas C. Platt, Jr. (E.D.N.Y.) at ALI-ABA's Civil Practice and Litigation Conference, the author concluding that the number of Rule 11 motions has decreased drastically).

106. *See* 28 U.S.C. §§ 620-629 (1994 & Supp. II 1996) (discussing the overall mechanisms and functions of the Federal Judicial Center).

107. *See* JOHN SHAPARD ET AL., FED. JUD. CTR., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 1 (1995) [hereinafter JUDICIAL CENTER SURVEY] (noting that the survey concentrated on the 1993 amendments and proposed legislative changes).

108. *See id.* at 1 (explaining that the survey attempted to ask judges and lawyers the same questions, but noting that they have different viewpoints due to their different roles in the

proposed legislation that would essentially restore the pre-1993 version of the Rule.¹⁰⁹

Based on the responses, the Judicial Center reported that a majority of the judges and attorneys believed that the purpose of Rule 11 “should encompass compensation of parties injured by violations of Rule 11, as well as deterrence of such violations.”¹¹⁰ A majority of those responding, however, also opposed the proposed legislative changes to the amended Rule¹¹¹ because they believed that sanctions “should not be mandatory for any violation, and that compensation should not be mandatory when a sanction is imposed.”¹¹² When asked whether “an award of attorneys’ fees sufficient to compensate the injured party” should be imposed whenever sanctions were imposed, the respondents also disagreed.¹¹³

The responding judges and attorneys generally expressed support for the specific features of the amended Rule.¹¹⁴ Furthermore, large majorities of both judges (70%) and practitioners (ranging from 61% of defense attorneys to 80% of plaintiffs’ attorneys) indicated that they “either moderately or strongly” supported the safe harbor provision.¹¹⁵ The “judges also were asked whether the safe harbor provision had affected the amount of Rule 11” filings; the Judicial Center reported that “the vast majority indicated that Rule 11 activity either remained the same (37%) or decreased (39%).”¹¹⁶ Only two judges thought the provision resulted in more Rule 11 activity, and 23% were unable to answer the question.¹¹⁷

The survey asked the respondents to evaluate the fairness of the amendment’s more relaxed certification standard that permits the inclusion in a pleading of factual contentions that are “likely to have

judicial process). Responses were received from 82% of the judges and 52% of the attorneys. *See id.* at 1 & n.3.

109. *See id.* (noting the survey questioned judges and attorneys about their opinions on the effects of Rule 11 prior to 1993, the 1993 amendments to the rule, and the merits of proposals that would reverse the amendments, returning the Rule to its pre-1993 version).

110. *See id.* at 2 (concluding that the compensatory sanctions issues was the only noteworthy exception to the general support for continuing with Rule 11 and the 1993 amendments).

111. *See id.*

112. *See id.*

113. *See id.* (reporting that only 15% of the judges, 21% of plaintiffs’ attorneys, 34% of defense attorneys, and 31% of other attorneys supported that proposition).

114. *See id.* at 2-7 (discussing opinions about groundless litigation, safe harbor provisions, factual allegations, and the purpose and requirements for sanctions).

115. *See id.* at 4 (analyzing the response to the safe harbor provision). In the survey, attorney respondents were asked whether they mainly represented plaintiffs or defendants in their civil practice and, based upon their responses, the Judicial Center created appropriate categories in the results. Attorneys representing plaintiffs and defendants were equally placed in an “other attorneys” category. *See id.* at 3 n.7.

116. *See id.* at 4.

117. *See id.*

evidentiary support after a reasonable opportunity for further investigation or discovery.”¹¹⁸ The Judicial Center found that a large majority of plaintiffs’ attorneys supported that amendment, while judges and defense attorneys “were about equally split” between support for the amendment and the proposed legislation that would repeal that provision.¹¹⁹

The amendment’s shift in the emphasis of Rule 11 away from compensation towards deterrence, however, did not secure broad support.¹²⁰ Two-thirds of the judges (66%), defense attorneys (63%), other attorneys (66%), and even a substantial portion of plaintiffs’ attorneys (43%), supported Rule 11 having a compensatory purpose.¹²¹

The respondents also were asked general questions about the overall need for Rule 11, particularly in the context of other factors, such as the prompt dismissal of claims and Rule 16 conferences, which might deter or reduce the problem of groundless arguments.¹²² The Judicial Center reported that the “vast majority agreed that Rule 11 is needed in some form, but there are notable differences among respondents whether and in what respect the rule should be modified.”¹²³ The respondents generally indicated that the Rule is needed “and it is just right as it now stands.”¹²⁴ Finally, the respondents generally favored keeping sanctions for discovery abuse exclusively within Rules 26(g) and 37.¹²⁵

The survey results also suggest that it is premature to conclude that the amended Rule will alter Rule 11 practice radically, or the behaviors it is intended to address, at least in the short term. Respondents were asked whether “the problem of groundless litigation in civil cases [has] changed since Rule 11 was amended in

118. *See id.* at 5 (quoting the 1993 amendments to Rule 11(b)(3)).

119. *See id.* (noting that judges “were more likely than plaintiffs’ or defense attorneys to report that the pros and cons of the 1993 amendments are about equally balanced”).

120. *See id.* at 5 (noting that “respondents indicated support only for changing the purpose of the rule to include compensating as well as deterrence”).

121. *See id.*

122. *See id.* at 7 (assessing the general views expressed on Rule 11).

123. *Id.*

124. *See id.* Fifty-two percent of the judges agreed with that statement, as did 41% of plaintiffs’ attorneys, 37% of defense attorneys, and 40% of other attorneys. *See id.* In contrast, 32% of the judges and 37% of defense attorneys responded that the Rule should be “modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).” *Id.* Only 7% of the judges, 27% of plaintiffs’ attorneys, 12% of defense attorneys, and 16% of other attorneys stated that the Rule should be modified to avoid deterring meritorious filings, even at the expense of decreasing its effectiveness. *See id.*

125. *See id.* (noting 48% of judges, 59% of plaintiffs’ attorneys, 49% of defense attorneys, and 54% of other attorneys so stated, while 33% of judges, 12% of plaintiffs’ attorneys, 27% of defense attorneys, and 19% of other attorneys stated that such sanctions should be covered in both Rule 11 and Rules 26(g) and 37).

1993[?]”¹²⁶ Of the judicial respondents, 14% stated that the problem “is smaller now,” while 9% responded that the problem “is larger now.”¹²⁷ In contrast, 68% of judicial respondents replied that “the problem is the same now.”¹²⁸ There was a similar range of answers from the attorneys.¹²⁹ While the Judicial Center’s survey may not be considered “hard data” on the operation of the amended Rule, the survey provides some indication that, at least in the view of some judges and practitioners, the amended Rule is functioning without intractable problems.

B. Cases Decided Under the Amended Rule

Despite the passage of over five years since the amended Rule went into effect, there has been relatively little commentary on it in reported cases.¹³⁰ Although some courts have commented on the impact of the 1993 amendments in the course of their rulings, their commentary has been brief; only a small number of decisions express opinions as to the reforms intended by the amended Rule.¹³¹ The courts’ rulings, however, provide some support for the conclusion that the amended Rule is functioning in a manner consistent with the expectations of its original proponents.¹³² Review of reported decisions suggests that the Rule is being applied according to its terms, and generally without misunderstanding or misapplication.¹³³

126. *See id.* at 3.

127. *See id.*

128. *See id.*

129. Of the defense attorneys, 12% believed the problem to be smaller, 10% to be larger, and 53% the same. *See id.* at 3. Of the plaintiffs’ attorneys, 11% believed the problem to be smaller, 1% to be larger, and 31% the same. *See id.* For other attorneys, 13% believed the problem to be smaller, 5% to be larger, and 48% the same. *See id.*

130. *But see generally* Meredith v. Integretel, Inc., No. 97-C839, 1997 WL 156531, at *1 (N.D. Ill. Mar. 31, 1997) (commenting that in 1993, Rule 11 “had its fangs drawn” and that the safe harbor gives the litigant “one risk-free bite,” like the common law rule on dog bites); Titan Indus. Corp. v. Federal Ins. Co., No. 94 Civ. 726, 1995 WL 438843, at *6 (S.D.N.Y. July 26, 1995) (commenting that 1993 amendments “watered down” Rule 11).

131. *See supra* note 130 and accompanying text.

132. *See infra* notes 140-56 and accompanying text.

133. This conclusion is based on the author’s review of over 700 decisions reported through Westlaw and Lexis databases. Eliminated from the discussion are decisions that, although dated on or after December 1, 1993, either explicitly apply the 1983 version of the Rule, or which appear to have applied that version, rather than the current one. *See, e.g.,* Boyce v. Microsoft Corp., No. 92 C 7075, 1995 WL 153281, at *1 (N.D. Ill. Apr. 6, 1995) (imposing Rule 11 sanctions on an attorney for filing a lawsuit without sufficient legal authority and ordering him to pay the opposing party’s legal fees in the amount of \$33,125.44); Corporate Printing Co. v. New York Typographical Union No. 6, 886 F. Supp. 340, 343 (S.D.N.Y. 1995) (discussing 1983 version of Rule 11 with respect to sanctions for signatures on frivolous motions and pleadings); Walton v. Marx, No. 93 CIV. 6770 (PKL), 1994 WL 592705, at *7 (S.D.N.Y. Oct. 28, 1994) (noting that the court “must apply an objective standard of reasonableness” when deciding whether Rule 11 sanctions are warranted); Ware v. Jolly Roger Rides, Inc., 857 F. Supp. 462, 465 (D. Md. 1994) (imposing sanctions in the amount of \$1,000.00 where plaintiff’s counsel

1. *The safe harbor in practice*

Courts have been very attentive to the operation and effectiveness of the safe harbor provision. There have been a significant number of rulings in which the courts have denied sanctions motions, without resolving the merits of the motion itself, because the movant failed to comply with the safe harbor requirements.¹³⁴ While few of those

brought suit in federal court despite a clear lack of diversity jurisdiction, and stating that the fine should serve as an "appropriate deterrent" to such improvident filings); *Ware v. United States*, 154 F.R.D. 291, 292 (M.D. Fla. 1994) (finding that amended Rule 11 does not apply to motions and pleadings filed prior to the enactment of the new rule; and holding that conclusory statements, without supporting case law or analysis, are insufficient for the court to impose sanctions).

134. See *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (stating that informal warnings, orally or by letter, are not equivalent to service of a motion); *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1058 (7th Cir. 1998) (reversing sanctions due to movants' noncompliance with safe harbor provision and separate motion requirements); *Ridder v. City of Springfield*, 109 F.3d 288, 296-97 (6th Cir. 1997) (holding movant gave up the opportunity to receive Rule 11 sanctions by filing the sanctions motion after entry of summary judgment), *cert. denied*, 118 S. Ct. 687 (1998); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) (finding movants failed to comply with the procedural prerequisite of serving sanctions motion on opposing party and opposing party's counsel prior to filing); *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2d Cir. 1995) (stating that the movant failed to submit the sanction request as a separate request, and also failed to serve the opposing party prior to presenting motion to court); *Israel v. Carpenter*, No. 95 Civ. 2703, 1999 WL 459781, at *3 (S.D.N.Y. June 30, 1999) (denying plaintiff's application for sanctions for failure to provide safe harbor notice); *Lehman Bros. v. Masselli*, No. 93 Civ. 4478 AGS RJW, 1998 WL 531831, at *8 (S.D.N.Y. Aug. 24, 1998) (mem.) (finding noncompliance with safe harbor and separate motion requirements); *Lopez v. Constantine*, Nos. 94 Civ. 5921, 95 Civ. 5915, 1997 WL 793595, at *2 (E.D. Pa. Dec. 23, 1997) (concluding that a warning letter is not the equivalent of a safe harbor motion and finding the conduct not sanctionable); *Lancaster v. Zufle*, 170 F.R.D. 7, 7 (S.D.N.Y. 1996) (concluding that a warning letter is not a safe harbor motion); *Sears, Roebuck & Co. v. Sears Realty Co.*, 932 F. Supp. 392, 408 (N.D.N.Y. 1996) (rejecting plaintiff's Rule 11 motion, *inter alia*, because plaintiff failed to file motion separately or serve defendant prior to filing motion in court); *Bowler v. INS*, 901 F. Supp. 597, 604 (S.D.N.Y. 1995) (stating that Rule 11 sanctions would not be levied because movant failed to provide notice as required by the rule and action had been terminated); *UFCW, Local No. 576 v. Four B Corp.*, 893 F. Supp. 980, 987 (D. Kan. 1995) (finding that plaintiff failed to serve defendant with sanctions motion prior to filing), *aff'd*, 83 F.3d 433 (10th Cir. 1996); *Costantini v. Guardian Life Ins. Co. of Am.*, 859 F. Supp. 89, 91 (S.D.N.Y. 1994) (stating that a motion for sanctions must be raised with opposing counsel before an application for sanctions will be considered by the court); *Weinreich v. Sandhaus*, 156 F.R.D. 60, 63 (S.D.N.Y. 1994) (denying plaintiff's Rule 11 motion because plaintiff failed to follow proper procedure and the motion was untimely); *Dunn v. Pepsi-Cola Metro. Bottling Co.*, 850 F. Supp. 853, 856 n.4 (N.D. Cal. 1994) (finding plaintiff failed to file separate motion for sanctions as required under Rule 11); *Powell & Saucer*, *supra* note 82, at 275 n.28 (reviewing cases applying the provision). *But see Galonsky v. Williams*, No. 96 Civ. 6207, 1997 WL 759445, at *7 (S.D.N.Y. Dec. 10, 1997) (suggesting that although movant had not technically complied with the safe harbor provision of Rule 11 of service of motion before filing, opposing party's warning letter alerted movant to the violation, and thus insisting upon a motion "exalts form over function"); *Littel v. Twentieth Century-Fox Film Corp.*, No. 89 Civ. 8526, 1996 WL 376971, at *8 (S.D.N.Y. July 5, 1996) (in applying dictum, the 1983 version of Rule, to the effect that a warning letter put counsel on notice of Rule 11 violation), *rev'd sub nom.* *Destefano v. Twentieth Century-Fox Film Corp.*, Nos. 96-7923, 96-9023, 1997 WL 165333, at *2 (2d Cir. Apr. 3, 1997) (unpublished disposition) (holding that defendants waived any claim to fees given the long delay in filing sanctions motion); *Foufas v. Leventhal*, No. 94 Civ. 7924, 1995 WL 332020, at *3 n.3 (S.D.N.Y. June 5, 1995) (suggesting that violator was on notice despite noncompliance with safe harbor and separate motion requirements).

decisions express an opinion on the safe harbor provision, there has been an occasional expression of approval. As one court remarked: "This 'safe harbor' provision has the salutary effect of providing the appropriate due process considerations to sanction litigation, reducing Rule 11 volume and eliminating abuses proscribed by this Rule."¹³⁵ Another court stated in denying a sanctions motion for failure to comply with the safe harbor provision, "the keynote [to amended Rule 11] is cooperation and simple solutions, not paperwork and unnecessary expenses to clients."¹³⁶ The Sixth Circuit recently observed that the Rule's drafters "anticipated that civility among attorneys and between bench and bar would be furthered by having attorneys communicate with each other with an eye toward potentially resolving their differences prior to court involvement."¹³⁷

There also have been a substantial number of reported cases in which sanctions motions have been denied because the Rule 11 motion was combined with another motion, such as a motion to dismiss or a motion for summary judgment.¹³⁸ Over time, as litigants gain more experience operating under the amended Rule, it is reasonable to predict that there will be fewer decisions on the safe harbor procedure and related motions practice.¹³⁹

135. Photocircuits Corp. v. Marathon Agents, Inc., 162 F.R.D. 449, 452 (E.D.N.Y. 1995).

136. Thomas v. Treasury Management Ass'n, 158 F.R.D. 364, 366 (D. Md. 1994). The court characterized the safe harbor as an "absolute[] prerequisite" to a Rule 11 motion. *See id.* at 369 (citing Schwarzer, *supra* note 104, at 20-21).

137. *Ridder*, 109 F.3d at 294.

138. *See* L.B. Foster Co. v. American Piles, Inc., 138 F.3d 81, 89-90 (2d Cir. 1998) (reversing sanctions order due to noncompliance with separate motion requirement); *Hedges*, 48 F.3d at 1328 (same); *Lambertson v. Kerry Ingredients, Inc.*, No. CV 98-5059 (ADS), 1999 WL 395118, at *8 (E.D.N.Y. June 11, 1999) (declining to impose Rule 11 sanctions where request was made within motion for judgment on the pleadings); *Cortez v. CMG Worldwide, Inc.*, 962 F. Supp. 308, 313 (N.D.N.Y. 1997) (finding plaintiff failed to separate sanctions motion from response papers); *Scott v. Real Estate Fin. Group*, 956 F. Supp. 375, 386 (E.D.N.Y. 1997) (stating that movant failed to follow procedural requirements of Rule 11); *Downey v. UFCW, Local 1262*, 946 F. Supp. 1141, 1160 (D.N.J. 1996) (finding that movant failed to file sanctions motion separately from summary judgment motion); *Green v. Kadilac Mortgage Bankers, Ltd.*, 936 F. Supp. 108, 118 n.5 (S.D.N.Y. 1996) (noting movant failed to file sanctions motion separately); *Sears, Roebuck*, 932 F. Supp. at 408 (denying motion for sanctions based on failure to comply with separate motion requirement); *Fat T, Inc. v. Aloha Tower Assocs. Piers 7, 8, & 9*, 172 F.R.D. 411, 415 (D. Haw. 1996) (same); *D'Orange v. Feely*, 877 F. Supp. 152, 160 (S.D.N.Y. 1995) (same); *Tate v. Lau*, 865 F. Supp. 681, 691 (D. Nev. 1994) (same); *Loewen Group Int'l, Inc. v. Haberichter*, 863 F. Supp. 629, 634-35 (N.D. Ill. 1994) (same), *rev'd on other grounds*, 65 F.3d 1417 (7th Cir. 1995); *Hoydal v. Prime Opportunities, Inc.*, 856 F. Supp. 327, 329 (E.D. Mich. 1994) (denying motion for sanctions because it was included in the defendant's motion to dismiss); *Dunn*, 850 F. Supp. at 856 n.4 (finding movant failed to file sanctions motion separately); *Voice Sys. Mktg. Co. v. Appropriate Tech. Corp.*, 153 F.R.D. 117, 120 (E.D. Mich. 1994) (rejecting sanctions motion because defendant's motion for sanctions was included in the motion to dismiss).

139. By the author's estimated count, since the amended Rule went into effect there have been well over 100 rulings denying motions for failure to comply with the safe harbor and/or separate motion requirements. *See supra* note 134 and accompanying text (discussing the safe harbor requirement); *supra* note 138 and accompanying text (describing the separate motion

2. *How is judicial discretion being exercised?*

With the amended Rule's shift from mandatory to discretionary imposition of sanctions, it is important to evaluate whether judges are exercising their recently conferred discretion in a reasonable manner. Do the reported decisions indicate that the courts are denying sanctions motions without explanation, or that the courts are excusing egregious violations of the Rule because they have the discretion to do so? If so, then the amended Rule is not working or, at the very least, is being misapplied.¹⁴⁰

The reported decisions do not illuminate this problem very well. There have been a number of decisions in which the courts simply have summarized the respective positions of the movant and opponent, and then denied a sanctions motion with little or no explanation.¹⁴¹ Such summary treatment of the Rule 11 motion makes it very difficult to evaluate whether the court's discretion was exercised reasonably.¹⁴² Courts cannot be faulted for devoting

requirement).

140. Courts generally appear to be aware of the fact that the 1993 amendments provide them discretion to impose sanctions, rather than a mandatory duty to impose them. *See, e.g., Segarra v. Messina*, 158 F.R.D. 230, 233-34 (N.D.N.Y. 1994) (noting that "[w]hereas the imposition of sanctions for a Rule 11 violation was mandatory under the 1983 version, the 1993 amendments provide that such an imposition of sanctions is now discretionary" but imposing a sanction of attorneys' fees on the plaintiffs anyway). There are, however, a few rulings in which courts have indicated that the award of sanctions is mandatory. *See Leistikow v. Mangerson*, 172 F.R.D. 403, 407 (E.D. Wis. 1997) (denying sanctions, but in its discussion the court uses "must impose" terminology); *Fernandez v. Galen Hosp. Ill., Inc.*, No. 96-C2579, 1997 WL 675042, at *3 (N.D. Ill. Oct. 28, 1997) (suggesting that the imposition of sanctions is mandatory); *Integrated Pet Foods, Inc. v. Pennsylvania*, No. CIV.A.95-78471, 1996 WL 153216, at *2 (E.D. Pa. Apr. 1, 1996) (stating that where a Rule 11 violation is found, the court is "required to impose sanctions"); *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 164 F.R.D. 694, 700 (M.D. Fla. 1996) (suggesting that the award of sanctions is mandatory); *Thorpe v. Alber's, Inc.*, 922 F. Supp. 84, 94-95 (E.D. Tenn. 1996) (same); *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 871 F. Supp. 1010, 1017 (N.D. Ill. 1994) (using "shall" terminology); *Louis v. Alyan*, No. 94-C3696, 1994 WL 529383, at *3 (N.D. Ill. Sept. 27, 1994) (stating that the court "must impose" sanctions if Rule 11 is violated).

141. *See Tri-Tech Mach. Sales, Ltd. v. Artos Eng'g Co.*, 928 F. Supp. 836, 840-41 (E.D. Wis. 1996) (providing a brief description and explanation for the court's conclusion that sanctions are not warranted); *DePugh v. Sutton*, 917 F. Supp. 690, 697-98 (W.D. Mo. 1996) (noting only that plaintiff argued that he had additional causes of action that he did not have opportunity to pursue, but simply concluding that the suit was not frivolous, the complaint was not filed for improper purpose, and the factual contentions were not lacking in evidentiary support or that facts were not based upon a lack of information or belief), *aff'd*, 104 F.3d 363 (8th Cir. 1996); *DiMarco v. Rome Hosp. & Murphy Mem'l Hosp.*, 899 F. Supp. 91, 96 (N.D.N.Y. 1995) (providing no factual discussion on court's denial of sanctions motion); *Anyanwu v. CBS, Inc.*, 887 F. Supp. 690, 694 (S.D.N.Y. 1995) (stating that the record did not support sanctions); *Segarra v. Messina* 158 F.R.D. 230, 235 (N.D.N.Y. 1994) ("[A]ssuming *arguendo* that a separate motion was made, the court would still use its discretion to deny sanctions as it does not find plaintiff's argument in his motion . . . to be frivolous.").

142. It should be noted that "the text [of Rule 11] does not require findings if a court decides not to impose sanctions." *Vairo, The New Rule 11, supra* note 104, at 62. Some recent decisions, however, have provided what appear to be sufficient explanations for denying sanctions motions. *See Scott v. Real Estate Fin. Group*, 956 F. Supp. 375, 386 (E.D.N.Y. 1997)

relatively little discussion to these motions, particularly if they conclude that the motion is without a solid basis, and that their rulings instead should focus on explaining how they resolve the parties' substantive motions.¹⁴³ In addition, courts may be more reluctant to impose sanctions except for serious violations of the Rule.¹⁴⁴ It is, therefore, difficult to conclude that the amended Rule's delegation of discretion to district courts results in the misuse of that discretion.

3. *How are the substantive provisions of the amended Rule being applied?*

Just as it is important to confirm that courts are exercising appropriate discretion under the amended Rule, it is important to determine whether courts are applying the Rule's provisions correctly in sanctions proceedings. Although there are relatively few case decisions from which to evaluate this issue, it appears that courts generally are applying the Rule correctly.¹⁴⁵ For example, the Rule's provisions are being applied to firms and organizations, as opposed to the signer of the pleading exclusively,¹⁴⁶ and the amended Rule,

(stating that sanctions are not appropriate when there are few cases on relevant statutes and the movant failed to comply with the separate motion requirement); *Gap, Inc. v. Stone Int'l Trading, Inc.*, 169 F.R.D. 584, 590 (S.D.N.Y.) (finding that plaintiff had facts that formed an objective basis for his claims), *aff'd*, 125 F.3d 845 (2d Cir. 1997); *Pobel v. Hans Christian Yachts, Inc.*, 933 F. Supp. 494, 496 (D. Md. 1996) (explaining how "plaintiff could have argued on a nonfrivolous basis that facts of his case were similar to those cases where RICO violations were established"); *Clancy v. Mobil Oil Corp.*, 906 F. Supp. 42, 50 (D. Mass. 1995) (noting that the lack of clearly defined First Circuit precedent on the subject illustrated that plaintiff's claim was not baseless); *Friedlob v. Trustees of the Alpine Mut. Fund Trust*, 905 F. Supp. 843, 860-61 (D. Colo. 1995) (providing detailed explanation for denial of sanctions); *Clapp v. LeBouef, Lamb, Leiby & MacRae*, 862 F. Supp. 1050, 1062 (S.D.N.Y. 1994) (explaining why sanctions are inappropriate), *aff'd*, 54 F.3d 765 (2d Cir. 1995).

143. Professor Vairo contends that courts should not be required to issue findings when they deny sanctions motions, because "movants have no right to a sanctions award" and the 1993 amendments have made sanctions discretionary. See Vairo, *The New Rule 11*, *supra* note 104, at 62. Several appellate decisions, however, indicate that trial courts, at least in some situations, should explain their reasoning in denying sanctions motions. See *Teamsters Nat'l Freight Indus. Negotiating Comm. v. MME, Inc.*, 116 F.3d 1241, 1242 (8th Cir. 1997) (noting district court's "perfunctory generalized response" to court's specific remand instructions on Rule 11 issue); *Cunningham v. Waters Tan & Co.*, 65 F.3d 1351, 1361 (7th Cir. 1995) (applying the 1983 version of the Rule and finding "lack of any statement of reasons by the district court . . . precludes effective appellate review"); see also Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 772-73 (1996) (noting potential for evasion of review).

144. See *Krauth v. Executive Telecard, Ltd.*, 870 F. Supp. 543, 548 (S.D.N.Y. 1994) (characterizing 1993 amendments as intended "to discourage imposition of monetary and other sanctions under the Rule where conduct does 'not reach the point of clear abuse'" (citation omitted)).

145. See *supra* note 133 and accompanying text.

146. See *Browder v. General Motors Corp.*, 5 F. Supp. 2d 1267, 1276 (M.D. Ala. 1998) (finding that conduct of lead counsel and the "young lawyer" would be at some risk of sanctions); *Salahuddin v. Coughlin*, 999 F. Supp. 526, 540 (S.D.N.Y. 1998) (directing State Assistant Attorney General to show cause why sanctions should not be imposed on him personally and/or the Attorney General's office); *Hernandez v. New York City Law Dep't Corp.*

with only a few exceptions, has not been applied to discovery or disclosure disputes.¹⁴⁷ Courts also appear to be levying sanctions consistent with the Advisory Committee's recommendation that sanctions should be reserved for substantial, not minor, violations of the Rule.¹⁴⁸ Several decisions denying sanctions motions also have noted the concern that advocacy not be chilled through application of the Rule.¹⁴⁹

A few decisions also have applied the amended Rule to counsel's continued advocacy of a position stated in an earlier pleading. The Eleventh Circuit affirmed a ruling that counsel who entered an appearance in the case and continued to defend his predecessor's complaint, which was held to be frivolous, was subject to sanctions.¹⁵⁰ In contrast, the Second Circuit reversed, in part, a ruling that statements by counsel at a pretrial conference were sanctionable.

Counsel, No. 94 Civ. 9042, 1997 WL 27047, at *14 n.11 (S.D.N.Y. Jan. 23, 1997) (commanding Assistant Corporation Counsel to show why sanctions should not be imposed on her and directing her to bring her supervisor to the next conference); *Jones v. Schneider*, 896 F. Supp. 488, 491 (D.V.I. 1995) (directing government counsel to show cause why government and government's counsel should not be sanctioned.); *SEC v. Knoxville, LLC*, 895 F. Supp. 192, 195 (E.D. Tenn. 1995) (sanctioning attorney and law firm).

147. See *Hines v. Abbott Realty, Inc.*, No. 96-C2465, 1998 WL 157066, at *4 (N.D. Ill. Mar. 31, 1998) (stating that "Rule 11 does not apply to discovery matters"); *General Motors Corp. v. Johnson Matthey, Inc.*, 887 F. Supp. 1240, 1246 (E.D. Wis. 1995) ("A court may not award sanctions pursuant to Rule 11 . . . in connection with disclosures and discovery requests . . ."). *But see* *Abrams v. General Elec. Co.*, No. 95 Civ. 1734, 1998 WL 52035, at *3 (N.D.N.Y. Feb. 2, 1998) (applying Rule to misstatements of law on appeal from magistrate judge's ruling concerning non-party deposition subpoena); *SEC v. Kimmes*, No. M18-304, 1996 WL 734892, at *12 (S.D.N.Y. Dec. 24, 1996) (examining whether nonproduction of documents was a violation of Rule 11); *Payroll Express Corp. v. Aetna Cas. & Sur. Co.*, No. 95 Civ. 4395, 1996 WL 706941, at *3 (S.D.N.Y. Dec. 9, 1996) (stating in dictum, response to discovery request is subject to terms of Rule 11(b)); *Beanal v. Freeport-McMoRan, Inc.*, No. CIV.A.96-1474, 1996 WL 476879, at *1 (E.D. La. Aug. 22, 1996) (upholding decisions to fine attorney \$1,000 under Rule 11 and 28 U.S.C. § 1927 for misrepresentations concerning depositions); *Reid v. St. Luke's-Roosevelt Hosp. Ctr.*, No. 94 Civ. 4676, 1995 WL 125387, at *2 (S.D.N.Y. Mar. 22, 1995) (noting that a frivolous appeal from a discovery order is subject to Rule 11).

148. See *LaBarge v. Chase Manhattan Bank, N.A.*, No. 95 Civ. 173, 1998 WL 157338, at *1 (N.D.N.Y. Mar. 30, 1998) (declining to issue Rule 11 sanctions for discrepancies between versions of a brief filed and served); *Weiss v. Weiss*, 984 F. Supp. 682, 686 (S.D.N.Y. 1997) (noting in dictum, that alleged violation was an "isolated incident"). In several cases, courts have issued sanctions for violations within a pleading. See *Malkowski v. PTC Capital Corp.*, No. 96-C3109, 1998 WL 381050, at *4 (N.D. Ill. July 1, 1998) (issuing Rule 11 sanctions for claims in complaint for intentional infliction of emotional distress because they were unsupported by any evidence on the record); *Dixon v. Holmes*, No. 91-C4994, 1994 WL 532193, at *2 (N.D. Ill. Sept. 26, 1994) (awarding fees based on specific count of summary judgment motion that was held to be frivolous).

149. See *Columbia Gulf Transmission Co. v. United States*, 966 F. Supp. 1453, 1466 (S.D. Miss. 1997) ("The imposition of Rule 11 sanctions should be approached with caution and should not be imposed so as to 'chill creativity or stifle enthusiasm or advocacy.'") (citation omitted); *Fat T, Inc. v. Aloha Tower Assocs. Piers 7, 8, & 9*, 172 F.R.D. 411, 415 (D. Haw. 1996) (refusing to sanction defendant because to do so would "chill creativity or stifle enthusiasm or advocacy" by attorneys); *In re Towers Fin. Corp. Noteholders Litig.*, No. 93 Civ. 0810, 1995 WL 571888, at *28 (S.D.N.Y. Sept. 20, 1995) (same).

150. See *Turner v. Sungard Bus. Sys., Inc.*, 91 F.3d 1418, 1421-22 (11th Cir. 1996).

The court held that there must be a “close nexus between the oral statement and the underlying written paper.”¹⁵¹ Simply advancing a contention contained in a pleading is not sanctionable.¹⁵² As the Second Circuit explained: “to be sanctionable the oral statement must relate directly to a particular representation contained in the document that the lawyer is then advocating.”¹⁵³

4. *How are courts exercising the authority to impose sanctions sua sponte?*

There are now a substantial number of reported decisions in which courts have invoked their authority under Rule 11(c)(1)(B) to impose sanctions, or at least have required a litigant to respond to a “show cause” order as to why sanctions should not be imposed.¹⁵⁴ These rulings represent a small number of decisions relative to the

151. See *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir. 1996) (rejecting “district court’s view that Rule 11 applies to oral advocacy whenever an attorney advocates a signed paper”).

152. See *id.*

153. *Id.* at 1490.

154. See *Turner*, 91 F.3d at 1421 n.3 (imposing sanctions pursuant to a show cause order under Rule 11(c)(1)(B)); *Jemzura v. Public Serv. Comm’n*, 961 F. Supp. 406, 415 (N.D.N.Y. 1997) (ordering plaintiff to show cause why sanctions should not be imposed); *Dodson v. Runyon*, 957 F. Supp. 465, 468 (S.D.N.Y. 1997) (ordering defense counsel to show cause), *aff’d*, 152 F.3d 917 (2d Cir. 1998); *Nash v. United States Dep’t of Justice*, 955 F. Supp. 146, 148-49 (D.D.C. 1997) (commanding plaintiff to show cause why case should not be dismissed for mootness and/or for noncompliance with Rule 11); 992 F. Supp. 447, 450 (D.D.C.) (discussing the court’s order that required the plaintiff to show cause “why the case should not be dismissed for noncompliance with Rule 11” and holding that plaintiff’s general statement that it complied with Rule 11 did not satisfy the court’s show cause order), *aff’d*, No. 98-5096, 1998 WL 545424 (D.C. Cir. July 20, 1998); *Bigsby v. Runyon*, 950 F. Supp. 761, 768 (N.D. Miss. 1996) (ordering *pro se* litigants to show cause), *appeal dismissed*, 129 F.3d 610 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1057 (1998); *Bardney v. United States*, 945 F. Supp. 152, 158 (N.D. Ill. 1996) (imposing sanctions for failure to cite applicable Seventh Circuit law), *motion to vacate denied by*, 959 F. Supp. 515, 525 (1997) (affirming sanctions and directing counsel to review, and certify such review, of local rules and Seventh Circuit’s rules on civility), *aff’d*, 151 F.3d 1032 (7th Cir. 1998); *Hill v. Gates*, 940 F. Supp. 108, 109-10 (M.D. Pa. 1996) (imposing sanctions on plaintiff for filing a multitude of frivolous complaints); *O'Brien v. United States Dep’t of Justice*, 927 F. Supp. 382, 385-86 (D. Ariz. 1995) (issuing show cause order to *pro se* plaintiff given repeated abuse of judicial process through refiling of previously dismissed suit), *aff’d*, 76 F.3d 387 (9th Cir. 1996); *Bullard v. Chrysler Corp.*, 925 F. Supp. 1180, 1183-91 (E.D. Tex. 1996) (fining attorney \$2,500, ordering him to attend mandatory continuing legal education, and referring him to state bar officials); *Thorpe v. Alber’s, Inc.*, 922 F. Supp. 84, 94-95 (E.D. Tenn. 1996) (finding plaintiff’s counsel could not show cause why sanctions should not be imposed); *Lake v. Department of Treasury*, 905 F. Supp. 1061, 1062 (N.D. Ga. 1995) (holding that plaintiff could not show cause why sanctions should not be imposed and thus fining plaintiff \$7,000), *aff’d*, 102 F.3d 554 (11th Cir. 1996); *S & S Diversified Serv., L.L.C. v. Taylor*, 897 F. Supp. 549, 552-53 (D. Wyo. 1995) (noting that the court upon its own motion may impose sanctions for any knowing attempt by judgment creditor to garnish exempt social security benefits); *Rhein Med., Inc. v. Koehler*, 889 F. Supp. 1511, 1517 (M.D. Fla. 1995) (imposing sanctions after court ordered evidentiary hearing); *Sherman v. Optical Imaging Sys., Inc.*, 843 F. Supp. 1168, 1183 (E.D. Mich. 1994) (ordering attorney to show cause); *cf. Watkis v. American Nat’l Ins. Co.*, 967 F. Supp. 1272, 1275 (M.D. Fla. 1997) (noting that the court considered *sua sponte* sanctions, but decided against imposing them), *aff’d*, 150 F.3d 1197, *reh’g denied*, 161 F.3d 23, (11th Cir. 1998) *cert. denied*, 119 S. Ct. 1120 (1999); *Bowler v. INS*, 901 F. Supp. 597, 604 (S.D.N.Y. 1995) (indicating a court’s invitation to counsel to seek sanctions is not an order to show cause by the court itself).

number of decisions in which courts have considered motions filed by a party.¹⁵⁵ If that trend continues, such a small proportion will vindicate the prediction made by some commentators, and implicitly by the Advisory Committee, that the court's *sua sponte* authority would *not* be exercised except in what would appear to be egregious situations.¹⁵⁶

Apart from the fact that courts' imposition of sanctions has been relatively infrequent under amended Rule 11(c)(1)(B), it is not as easy to form a definitive conclusion as to how the courts are exercising this authority—whether they are using that authority in appropriate cases, or whether the sanctions imposed are tailored to the specific case. The experience to date, however, suggests that the courts have been issuing show cause orders in cases where there appear to have been serious violations of the Rule, such as apparently frivolous pleadings or motions, rather than minor violations.¹⁵⁷ The

155. By the author's estimation, based on a review of reported cases, district courts have issued at least 80 show cause orders under the amended Rule.

156. See *supra* note 140 and accompanying text.

157. See *In re Henlar, Ltd.*, Nos. CIV.A.96-2374, CIV.A.94-11305, 1997 WL 4567, at *4 (E.D. La. Jan. 6, 1997) (issuing a show cause order concerning altered documents); *Iron Workers' Local No. 25 Pension Fund v. Nyeholt Steel, Inc.*, 946 F. Supp. 514, 518 (E.D. Mich. 1996) (ordering plaintiff to show cause concerning "baseless" summary judgment papers); *Two Men & A Truck/Int'l, Inc. v. Two Men & A Truck/Kalamazoo, Inc.*, No. 5:94-CV-162, 1996 WL 740540, at *2, *3 (W.D. Mich. Oct. 16, 1996) (declining to issue show cause order, stating that defendants' motion modify a preliminary injunction, although "redundant and futile," did not rise to the level of contempt of court); *Volek v. Rosewell*, No. 95-C6509, 1996 WL 400020, at *5 (N.D. Ill. July 15, 1996) (imposing \$3,000 sanctions for filing a frivolous complaint); *Doe v. Maywood Hous. Auth.*, No. 93-C2865, 1994 WL 521050, at *6-7 (N.D. Ill. Sept. 22, 1994) (directing defendant's attorney to show cause why Rule 11 sanctions should not be imposed for filing a frivolous counterclaim), *aff'd*, 71 F.3d 1294 (7th Cir. 1995); *Dixon v. Holmes*, No. 91-C4494, 1994 WL 532193, at *3 (N.D. Ill. Sept. 26, 1994) (issuing Rule 11 sanctions based on discrete issues in summary judgment papers); see also *S Indus., Inc. v. Diamond MultiMedia Sys., Inc.*, 17 F. Supp. 2d 775, 780 (N.D. Ill. 1998) (issuing a show cause order addressing one count of the complaint); *Newsome v. James*, 968 F. Supp. 1318, 1323-24 (N.D. Ill. 1997) (imposing a \$1.00 fine subject to a show cause order for failure to cite adverse precedent); *Tizes v. Curico*, No. 94-C7657, 1997 WL 116797, at *3 (N.D. Ill. Mar. 12, 1997) (directing defense counsel to show cause why they did not violate Rule 11(b) by filing a frivolous motion to disqualify opposing counsel); *Stevenson v. Employers Mut. Ass'n*, 960 F. Supp. 141, 144 (N.D. Ill. 1997) (ordering defense counsel to show cause regarding Rule 11 sanctions based on incorrect citations in two briefs); *Werbosky v. Ford Motor Credit Co.*, No. 95 Civ. 1876, 1996 WL 76133, at *2 (S.D.N.Y. Feb. 22, 1996) (issuing show cause order based on failure to cite adverse authority); *Perkins v. University of Ill. at Chicago*, No. 95-C4320, 1995 WL 680758, at *5 (N.D. Ill. Nov. 14, 1995) (addressing discrete counts of the complaint and issuing a Rule 11 show cause order); *United States v. Champion Pack. & Distrib., Inc.*, 94-C1813, 1995 WL 472739, at *3 (N.D. Ill. Aug. 9, 1995) (directing counsel to show cause regarding a Rule 11 violation for failure to withdraw factual contentions); *Cone Corp. v. Hillsborough County*, 157 F.R.D. 533, 537, 542 (M.D. Fla. 1994) (granting motions for attorneys' fees under Rule 11 based on misrepresentation of relevant legal precedent); *In re Omnitrition Int'l, Inc. Sec. Litig.*, No. 92-C4133, 1994 WL 476694, at *3, *6 (N.D. Cal. Aug. 19, 1994) (imposing Rule 11 sanctions on plaintiffs' counsel for alteration and falsified signature to expert declaration), *vacated in part*, No. 92-C4133, 1995 WL 626529, at *4 (N.D. Cal. Feb. 21, 1995) (vacating order regarding nonmonetary sanctions); *Wallace Computers Serv., Inc. v. David Noyes & Co.*, No. 93-C6005, 1994 WL 23110, at *8 (N.D. Ill. Jan. 21, 1994) (issuing show cause order for misrepresenting

reported decisions also suggest that such show cause orders generally are being issued in conformity with the procedural requirements of Rule 11(c)(1)(B).¹⁵⁸

5. *Is the Rule's deterrent purpose being advanced?*

One of the most important questions in evaluating the operation of the amended Rule is whether it is serving its overriding purpose—to deter frivolous filings. Cases decided under the amended Rule present a spectrum of responses to Rule 11 violations, rather than a single, unitary response. These rulings show that there remains an inherent tension in the Rule between achieving its deterrent objective through strong sanctions, and applying judicial discretion to ensure against overly severe sanctions that might chill advocacy.

Pursuant to amended Rule 11(c)(2), many courts have been levying substantial monetary fines against the violator, payable to the court itself.¹⁵⁹ This remedy appears to be common for serious violations of the Rule, consistent with the Rule and the Advisory Committee's recommendations.

There are, however, a few decisions in which modest fines were

case holdings, imposing \$300 per apparent violation).

158. See *Thornton v. General Motors Corp.*, 136 F.3d 450, 454-55 (5th Cir. 1998) (reversing district court because its show cause order failed to identify the conduct at issue); see also *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (2d Cir.), cert. denied, 118 S. Ct. 337 (1997) (reversing sanctions ruling as the litigant was only advised that Rule 11 sanctions were being sought, as opposed to sanctions under 28 U.S.C. § 1927); *Volek v. Rosewell*, No. 95-C85091, 1996 WL 341462, at *3 (N.D. Ill. June 17, 1996) (vacating prior sanctions order and issuing show cause order under the amended Rule's procedures).

159. See *Jones v. City of Buffalo*, No. 96-C0739E, 1998 WL 214807, at *5 (W.D.N.Y. Apr. 22, 1998) (imposing \$2,500 fine and injunction against further filings); *O'Grady v. Mohawk Finishing Prods., Inc.*, No. 96-CV-1945, 1998 U.S. Dist. LEXIS 3866, at *5 (N.D.N.Y. Mar. 28, 1998) (ordering payment of \$500 fine plus attorneys' fees); *Stewart v. State Farm Fire & Cas. Co.*, No. CIV.A.96-0441, 1997 WL 727493, at *3 (E.D. Pa. Nov. 21, 1997) (issuing \$1,000 fine to plaintiffs' counsel payable to the clerk of the court); *Hoffman v. Metrocall, Inc.*, No. 96 Civ. 0380, 1997 WL 253250, at *2 (S.D.N.Y. May 14, 1997) (imposing \$1,500 fine on show cause order payable to the clerk of the court); *Knestruck v. International Bus. Mach. Corp.*, 945 F. Supp. 1080, 1084 (E.D. Mich. 1996) (sanctioning litigant \$1,000 for frivolously filing a notice of removal); *ADO Fin., AG v. McDonnell Douglas Corp.*, 938 F. Supp. 590, 599 (C.D. Cal. 1996) (imposing \$10,000 fine on a litigant); *Washington v. Alaimo*, 934 F. Supp. 1395, 1400 (S.D. Ga. 1996) (ordering *pro se* litigant to file a \$1,500 contempt bond); *Comind Participacoes, S.A. v. Terry*, No. 91 Civ. 3803, 1996 WL 651097, at *6 (S.D.N.Y. Nov. 7, 1996) (imposing \$1,000 fine); *Wormley v. Cordell*, No. 96 Civ. 20012, 1996 WL 641646, at *3 (N.D. Cal. Nov. 4, 1996) (staying \$1,000 fine against *pro se* litigant so long as no further frivolous complaints would be filed); *Nutt v. United States*, No. 1:96-CV-96-MMP, 1996 WL 741592, at *5 (N.D. Fla. Oct. 7, 1996) (sanctioning plaintiff's counsel \$1,000 for filing frivolous motion to remand); *United States v. Ramirez*, 162 F.R.D. 253, 255 (D.P.R. 1995) (imposing \$1,500 fine), *aff'd*, 81 F.3d 147 (1st Cir. 1996); *Shrock v. United States*, No. 1:95-CV-205, 1995 WL 810029, at *1 (N.D. Ind. Nov. 14, 1995) (awarding a \$2,500 fine and \$2,500 in fees for filing meritless claims), *aff'd*, 92 F.3d 1187 (7th Cir. 1996); *Jacob v. Illanes*, No. 93 Civ. 916, 1993 WL 618334, at *1 (D.N.M. Dec. 21, 1993) (imposing \$5,000 fine payable to the registry of the court against *pro se* litigant for filing a meritless complaint).

imposed or were proposed to be levied in a show cause order.¹⁶⁰ Many courts have been imposing only modest monetary compensation on the moving party, often substantially reducing the amounts requested by the party.¹⁶¹ In some cases, these courts have explained that the low award is justified because the violator is a *pro se* litigant or may have a limited ability to pay a monetary sanction.¹⁶² Some courts conclude, for example, that monetary fines will not deter some litigants from filing frivolous lawsuits.¹⁶³ As a result, courts have issued a substantial number of rulings to enjoin such litigants from further filings absent court order.¹⁶⁴

Although the Rule continuously has discouraged compensatory

160. See *Gilbreath v. Le Del Tore*, No. 2:98-CV-0058, 1998 WL 160871, at *2 (N.D. Tex. Apr. 1, 1998) (issuing show cause order against *pro se* prisoner with \$5 as amount of proposed fine); *Watson v. Englewood Police Dep't*, No. Civ.A.94-94-3920, 1995 WL 16780, at *2 (D.N.J. Jan. 12, 1995) (issuing show cause order against *pro se* prisoner with \$10 proposed fine).

161. See *Loving v. Pirelli Cable Corp.*, 11 F. Supp. 2d 480, 498-500 (D. Del. 1998), *aff'd*, 178 F.3d 1279 (3d Cir. Mar. 17, 1999) (reducing Rule 11 sanction from \$37,000 to \$10,000); *Noga v. Kimco Corp.*, No. 96-C6108, 1998 WL 9127, at *5-7 (N.D. Ill. Jan. 6, 1998) (awarding \$5,000 when \$25,000 was requested); *Simon De Bartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 985 F. Supp. 427, 433-34 (S.D.N.Y. 1997) (reducing \$293,000 fees request to \$100,000); *Prim v. Peatco Ltd., L.P.*, 90-C7272, 1995 WL 447648, at *3 (S.D.N.Y. July 27, 1995) (reducing \$100,000 fees request to \$15,000); *cf. Littel v. Twentieth Century-Fox Film Corp.*, No. 89 Civ. 8526, 1996 WL 376971, at *7 (S.D.N.Y. July 5, 1996) (applying the 1983 version and awarding \$150,000 in fees although the court indicates it could have awarded \$75,000 more under the 1993 version), *rev'd*, Nos. 96-7923, 96-9023, 1997 WL 165333, at *1 (2d Cir. Apr. 3, 1997) (unpublished disposition); *Schilling v. Federal Home Loan Mortgage Corp.*, No. 1:93-CV-678, 1994 U.S. Dist. LEXIS 3185, at *3-4 (W.D. Mich. Feb. 18, 1994) (imposing only a \$500 fine to be paid to the court although \$5,000 in fees was requested).

162. See *Tolbert v. Dallas Area Rapid Transit*, No. CA 3-96-CV-0428-R, 1997 WL 135606, at *4 (N.D. Tex. Mar. 18, 1997) (imposing \$825.50 fine and issuing an order against further filings upon fifth suit by *pro se* litigant); *Katzman v. Victoria's Secret Catalog*, 167 F.R.D. 649, 661 (S.D.N.Y.) (awarding \$5,000, which was less than full fees), *aff'd*, 113 F.3d 1229 (2d Cir. 1997); *Kirschner v. Zoning Bd. of Appeals of Inc. Village of Valley Stream*, 159 F.R.D. 391, 398-400 (E.D.N.Y. 1995) (holding that \$12,700 would be reasonable attorney's fee award, but reducing it to \$2,500); *Payne v. Fontenot*, 925 F. Supp. 414, 425-26 (M.D. La. 1995) (declining to impose sanctions and admonishing plaintiffs and counsel); *Benton v. G & O Mfg. Co.*, 921 F. Supp. 905, 908-09 (D. Conn. 1995) (imposing a \$500 fine but declining to grant fees); *Young v. Corbin*, 889 F. Supp. 582, 586 (N.D.N.Y. 1995) (imposing \$25 fine on *pro se* litigant); *Super Power Supply, Inc. v. Macase Indus. Corp.*, 154 F.R.D. 249, 259 (C.D. Cal. 1994) (awarding \$15,000 despite request for approximately \$57,000); *In re Pozsga*, 158 F.R.D. 435, 439 (D. Ariz. 1994) (requiring \$100 fine be paid to the court).

163. See *Jones*, 1998 WL 214807, at *5 (determining, based on ineffectiveness of previous sanctions, that fines would not deter *pro se* litigant); *Rahim v. Teamsters, Local 237*, No. 95 Civ. 10072, 1998 WL 151025, at *9 (S.D.N.Y. Mar. 31, 1998) (issuing an injunction against a specific type of litigation and requiring the litigant to attach court's opinion to any proposed filing); *Bigby v. Runyon*, 950 F. Supp. 761, 770 (N.D. Miss. 1996) (finding that \$10,000 fine would not deter *pro se* litigants from further filings and instead, choosing to require certification by a federal judicial officer before plaintiffs file additional complaints).

164. See *Jones*, 1998 WL 214807, at *4-5 (reasoning that because Jones was a "vexatious litigant with an extensive history of filing frivolous, duplicative lawsuits and then litigating those lawsuits in a grossly abusive manner," in the future he must obtain the leave of the court before filing a complaint); *Rahim*, 1998 WL 151025, at *9 (holding that, due to the "high volume of frivolous claims filed by the plaintiff," any future complaint filed by plaintiff must have the court's opinion in the case attached and that the injunction handed down would apply).

awards, some courts have declined to award substantial attorneys' fees on the premise that the movant had a duty to mitigate its damages.¹⁶⁵ Those courts have ruled that a movant should not be compensated for time that, had counsel sought to persuade the violator to withdraw an incorrect position, could have been saved.¹⁶⁶ Under the amended Rule, courts are likely to continue the trend by making similar rulings.

Despite the thrust of the amended Rule's shift from compensation to deterrence, some courts still award attorneys' fees in Rule 11 proceedings.¹⁶⁷ Some of these rulings impose substantial monetary awards as compensation to the moving party.¹⁶⁸ Any final conclusion

165. See *Pollution Control Indus. of Am., Inc. v. Van Gundy*, 21 F.3d 152, 155-56 (7th Cir. 1994) (excluding defendants' expenses incurred in motion to dismiss from the sanctions award); *Levine v. County of Westchester*, 164 F.R.D. 372, 375 (S.D.N.Y. 1996) (balancing factors in determining the amount of sanctions to impose); *Temple v. WISAP USA in Texas*, 152 F.R.D. 591, 603 (D. Neb. 1993) (stating that the "lack of defense mitigation and notice strongly militates against fully compensatory monetary sanctions"); *Johnson v. McAdoo*, 150 F.R.D. 684, 688-89 (W.D. Okla. 1993) (considering mitigating factors when assessing the sanction); *Sussman v. Salem, Saxon & Nielsen, P.A.*, 150 F.R.D. 209, 216-17 (M.D. Fla. 1993).

166. See *Noga*, 1998 WL 9127, at *5-7 (discussing the duty to mitigate under the 1993 Rule); *ADO Fin., AG v. McDonnell Douglas Corp.*, 938 F. Supp. 590, 597 (C.D. Cal. 1996) (reminding defendant of the duty to mitigate); *Matthew Bender & Co. v. West Publ'g Co.*, Nos. 94 Civ. 0589, 95 Civ. 4496, 1996 WL 223917, at *11 n.6 (S.D.N.Y. May 2, 1996) (denying fees for defending against Rule 11 motion that had been filed improperly as part of another motion and stating that the party could have advised movant of the procedural flaw in its motion).

167. See *Forbes v. Merrill Lynch, Fenner & Smith, Inc.*, 179 F.R.D. 107, 112 (S.D.N.Y. 1998) (ordering payment of \$25,000 in fees); *Plante v. Fleet Nat'l Bank*, 978 F. Supp. 59, 68-69 (D.R.I. 1997) (finding that \$1,000 fine recommended by magistrate judge is sufficient deterrence, and that movant should recover its reasonable attorneys' fees), *amended by*, No. CIV.A.95-627L, 1998 WL 472439, at *6 (D.R.I. 1998) (awarding \$12,767 in fees); *Lal v. Borough of Kennett Square*, 935 F. Supp. 570, 578 (E.D. Pa. 1996) (imposing \$1,500 fine and ordering payment of attorneys' fees), *aff'd*, 124 F.3d 187 (3d Cir. 1997); see also *Watson v. City of Salem*, 934 F. Supp. 643, 665 (D.N.J. 1995) (requiring counsel to submit application for fees and stating that non-monetary sanctions will be inadequate under the specific circumstances); *Watson v. City of Salem*, 934 F. Supp. 666, 668 (D.N.J. 1996) (awarding \$8,028 in fees); *Babigian v. Rehnquist*, 901 F. Supp. 17, 18-19 (D.D.C. 1995) (awarding \$20,000 in fees), *aff'd*, 107 F.3d 922 (D.C. Cir. 1996); *Aetna Cas. & Sur. Co. v. Kellogg*, 856 F. Supp. 25, 33 (D.N.H. 1994) (ordering payment of reasonable attorneys' fees).

168. See *Miller v. United States*, No. 5:96-CV-1237, 1998 WL 372340, at *5 (N.D. Ohio Feb. 6, 1998) (sanctioning *pro se* plaintiff \$5,000 in fees); *Cooper v. Chicago Transit Auth.*, No. 95-C2616, 1997 U.S. Dist. LEXIS 5299, at *19-20 (N.D. Ill. Apr. 14, 1997) (awarding \$85,000 in fees); *Vildaver v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 94-C3041, 94-C3143, 1997 WL 7562, at *1-3 (N.D. Ill. Jan. 2, 1997) (granting approval of \$41,000 in fees); *Kahre-Richardes Family Found. v. Village of Baldwinville*, 953 F. Supp. 39, 42 (N.D.N.Y. 1997) (awarding \$9,800 in recoverable fees for summary judgment motion, in part, because of Rule 11 violations), *aff'd*, 141 F.3d 1151 (2d Cir. 1998); *John Akridge Co. v. Travelers Cos.*, 944 F. Supp. 33, 34 (D.D.C. 1996) (imposing \$25,000 in fees for the full costs of defending against suit), *aff'd*, 1997 WL 411654 (D.C. Cir. 1997); *Williams v. Prince Georges County Hosp. Ctr.*, 932 F. Supp. 687, 691 (D. Md.) (levying \$10,000 in fees against attorney), *aff'd*, 103 F.3d 122 (4th Cir. 1996); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 129 (N.D.N.Y. 1996) (imposing full fees sought by movant); *Ortman v. Thomas*, 906 F. Supp. 416, 424 (E.D. Mich. 1995) (awarding \$25,000 for the total amount of reasonable attorneys' fees and costs), *aff'd as modified*, 99 F.3d 807 (6th Cir. 1996); *Gray v. Millea*, 892 F. Supp. 432, 438 (N.D.N.Y. 1995) (levying over \$20,000 in fees); *Kramer v. Tribe*, 156 F.R.D. 96, 110-11 (D.N.J. 1994), *aff'd*, 52 F.3d 315 (3d Cir. 1995) (ordering payment of approximately \$70,000 in attorneys' fees and costs); *Toups v. Archer-*

on the “deterrence” issue, however, is difficult to reach because a court’s written ruling does not necessarily convey its actual impact on the sanctioned litigant.¹⁶⁹ The emphasis on deterrence as the amended Rule’s principal objective, however, may well influence sanction proceedings in the future.¹⁷⁰

The Rule’s shift in emphasis from compensation to deterrence may have at least one beneficial effect—the use of more innovative remedies for Rule 11 violations that are aimed at advancing the Rule’s deterrent purpose. For example, several courts have imposed requirements that attorneys attend continuing legal education courses.¹⁷¹ One court permitted an attorney’s fine to be paid to the clerk of the court in order to fund scholarships for such classes.¹⁷² Although some courts had imposed similar requirements under the 1983 version of the Rule,¹⁷³ today courts may issue more of these orders, consistent with the Advisory Committee’s recommendation. To date, only a few courts have imposed one of the more severe

Daniels-Midland Co., 155 F.R.D. 588, 590-91 (S.D. Tex. 1994) (ordering payment of \$10,000 for reasonable fees and expenses).

169. See, e.g., *Holling v. United States*, 934 F. Supp. 251, 253 (E.D. Mich. 1996) (imposing \$3,000 fine plus a reprimand to an attorney but also emphasizing that the attorney’s advocacy “will receive strict scrutiny in future cases in this Court”).

170. Two Eighth Circuit decisions suggest that it will review district court Rule 11 rulings somewhat more leniently. See *Pope v. Federal Express Corp.*, 49 F.3d 1327, 1328 (8th Cir. 1995) (“While we have strongly suggested that trial courts consider the level of punishment necessary to adequately deter the undesirable conduct, we have stopped short of requiring trial courts to apply the least severe sanction.”); *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1490-91 (8th Cir. 1994) (scrutinizing the sanctions imposed by the lower court and reducing the amount to be awarded).

171. See *Gaboury v. Town of Roxbury*, No. 98-CV-1753, 1999 WL 244829, at *5 (N.D.N.Y. Apr. 19, 1999) (requiring completion of eight hours of continuing legal education on federal practice or federal civil rights litigation); *Field v. Gates*, 184 F.R.D. 342, 345 (C.D. Cal. 1999) (requiring course on ethics and professional responsibility); *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 133 (D.N.J. 1998) (requiring attendance at two continuing legal education courses in addition to imposing a \$1,000 fine and attorneys’ fees); see also *Bardney v. United States*, 959 F. Supp. 515, 525 (N.D. Ill. 1997) (ordering attorney to review local rules and certify that review to the court), *aff’d*, 151 F.3d 1032 (7th Cir. 1998); *Bergeron v. Northwest Publications, Inc.*, 165 F.R.D. 518, 522-23 (D. Minn. 1996) (ordering completion of a continuing legal education course); *Bullard v. Chrysler Corp.*, 925 F. Supp. 1180, 1191 (E.D. Tex. 1996) (imposing \$2,500 fine and requiring ten hours of continuing legal education in legal ethics); *Prewitt v. Moore*, No. 4:94-CV10-B-A, 1996 WL 672129, at *3 (N.D. Miss. Aug. 28, 1996) (requiring six hours of continuing legal education classes on legal ethics); *LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 437 (S.D.N.Y. 1995) (ordering continuing legal education on federal employment discrimination law and federal civil procedure); *Ramirez v. IBP, Inc.*, No. CIV.A.92-2467, 1994 WL 243781, at *1 (D. Kan. May 23, 1994) (affirming CLE requirement as a Rule 11 sanction).

172. See *Del Canto v. ITT Sheraton Corp.*, 865 F. Supp. 934, 940 (D.D.C. 1994), *aff’d*, 70 F.3d 637 (D.C. Cir. 1995) (accepting counsel’s offer to pay \$500 into a court registry to fund scholarships for continuing legal education courses on Rule 11 for two young lawyers litigating cases on a contingent fee basis).

173. See *Curran v. Price*, 150 F.R.D. 85, 87 (D. Md. 1993) (ordering attorney to write, in longhand, a portion of a federal practice manual); see also *Oxfurth v. Siemens AG*, 142 F.R.D. 424, 428 (D.N.J. 1991) (requiring attendance at continuing legal education courses).

sanctions upon attorneys---referral to a state bar or similar disciplinary body.¹⁷⁴

Courts also have issued reprimands or admonitions as sanctions, consistent with the recommendations in the Advisory Committee Notes.¹⁷⁵ Although such sanctions do not have the direct impact of a fine or attorneys' fee award, they may have a substantial deterrent effect on future violations, not only by the immediate violator, but also on other litigants. Rulings that remind litigants of their obligations under the Rule can serve an educational function. One court, in denying a Rule 11 motion, emphasized the importance of the safe harbor when it stated: "Such collegiality is encouraged by the Rule in accord with what has long been considered professional behavior seeking to avoid the need for unnecessary judicial rulings."¹⁷⁶ The court concluded that it had "every confidence that these subtle reminders of the duties of counsel for both parties to the administration of justice will suffice to avoid the need for further action."¹⁷⁷ In recent Rule 11 rulings, courts have reminded attorneys that they are officers of the court,¹⁷⁸ and have explained that frivolous pleadings and sanctions proceedings consume judicial and therefore, public resources, in addition to the litigants' time.¹⁷⁹ As one district

174. See *Thorpe v. Alber's, Inc.*, 922 F. Supp. 84, 94-95 (E.D. Tenn. 1996) (reprimanding counsel and directing the clerk to forward the opinion to the Board of Professional Responsibility); *Bullard*, 925 F. Supp. at 1191 (referring the matter to the State Bar Association's Attorney Disciplinary Committee); *Chauvet v. Local 1199, Drug, Hosp. & Health Care Employees Union*, Nos. 96 Civ 2934, 96 Civ. 4622, 1996 WL 665610, at *20 (S.D.N.Y. Nov. 18, 1996) (referring the case to the court's grievance committee); see also *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 230 (5th Cir. 1998) (reversing district court's disbarment of attorney from practice because the district court failed to provide adequate notice).

175. See *McCampbell v. KPMG Peat Marwick*, 982 F. Supp. 445, 449 (N.D. Tex. 1997) (issuing a "formal reprimand and stern warning" to *pro se* litigant); *Massey v. Prince Georges County*, 918 F. Supp. 905, 909 (D. Md. 1996) (cautioning that supervisory attorneys in county attorney's office need to review pleadings of junior attorneys and compile "a corpus of applicable law" for review); *Holling v. United States*, 934 F. Supp. 251, 253 (E.D. Mich. 1996) (reprimanding attorney for "careless reading" of applicable authority); *Bazaar v. Peck*, No. CIV.A.96-3613, 1996 WL 755405, at *3 (E.D. Pa. Dec. 30, 1996) (criticizing submissions for use of sarcasm and miscitations); *Poag v. Humane Soc'y of Lawton*, 907 F. Supp. 1487, 1489-90 (W.D. Okla. 1995) (issuing reprimand for counsel's lack of diligence in meeting deadlines and filing obligations, including persisting to advocate claims despite motion to dismiss); *EEOC v. Taylor Elec. Co.*, 155 F.R.D. 180, 182-83 (N.D. Ill. 1994) (admonishing attorney concerning duty to cite adverse precedent and stating that the court's Rule 11 discussion "should serve as a warning to the litigants in this action so that the parties may avoid possible sanctions"); cf. *Abner Realty, Inc. v. Administrator of Gen. Serv. Admin.*, No. 97 Civ. 3075, 1998 WL 410958, at *9 (S.D.N.Y. July 22, 1998) (awarding \$5,000 in fees and directing that counsel send a letter of apology to the parties).

176. *Mareno v. Jet Aviation of Am., Inc.*, 155 F.R.D. 74, 77 (S.D.N.Y. 1994).

177. *Id.* at 76.

178. See *Georgopoulos v. International Bhd. of Teamsters*, 942 F. Supp. 883, 905 (S.D.N.Y. 1996), *aff'd*, 116 F.3d 1472 (2d Cir. 1997) (admonishing counsel for Rule 11 violations).

179. See *Hicks v. Bexar County*, 973 F. Supp. 653, 689 (W.D. Tex. 1997) ("The filing of this lawsuit, and the flood of many similar, equally frivolous, federal civil rights lawsuits flooding into this Court in recent months has placed a great strain on this Court's ability to timely

judge recently stated:

The purpose of the authority to impose sanctions is to make the bar conscious that frivolous complaints produce cost and delay through the calendar of the judge, consequently affecting all cases pending. This notice should serve the purpose of sanction. Plaintiff's attorney is advised to be more careful in the future in studying whether his client has a cause of action in accordance with the law and juris-prudence before filing a complaint.¹⁸⁰

Frivolous suits undermine public confidence and cast doubt on meritorious suits.¹⁸¹ There also are many decisions in which courts note the obligations of amended Rule 11 and/or directly remind litigants of them during a ruling even though no motion or show cause order is pending,¹⁸² or while denying a sanctions motion.¹⁸³

Although the above discussion reflects how the amended Rule is being applied in published rulings, only limited conclusions can be drawn from it. First, reported cases do not reflect court rulings that,

address the many potentially meritorious federal habeas corpus actions pending in this Court."), *aff'd*, 137 F.3d 1352 (5th Cir. 1998); *Jemzura v. Public Service Comm'n*, 961 F. Supp. 406, 415 (N.D.N.Y. 1997); *ADO Fin., AG v. McDonnell Douglas Corp.*, 938 F. Supp. 590, 599 (C.D. Cal. 1996); *Tidik v. Ritsema*, 938 F. Supp. 416, 427-28 (E.D. Mich. 1996); *Holmes v. NBC/GE*, 925 F. Supp. 198, 203 (S.D.N.Y. 1996) (declining to impose sanctions because such proceedings would divert the court from proceeding to the merits of the case); *cf. Vandeventer v. Wabash Nat'l Corp.*, 893 F. Supp. 827, 832-33 (N.D. Ind. 1995) (denying fees under Rule 11, but awarding fees under 28 U.S.C. § 1927, stating that the "case turned into a very ugly war between the lawyers, which was a disservice to their clients, the court and the legal system").

180. *Vazquez-Morales v. Estado Libre Asociado de P.R.*, 967 F. Supp. 672, 673 (D.P.R. 1997).

181. *See Schutts v. Bentley Nevada Corp.*, 966 F. Supp. 1549, 1566 (D. Nev. 1997) (stating that "when lawyers shower the court with frivolous papers, everyone suffers. Defense counsel become cynical and hardened against all civil rights plaintiffs" and legitimate civil rights plaintiffs pay a price).

182. *See Kuhns v. Corestates Fin. Corp.*, 998 F. Supp. 573, 577 (E.D. Pa. 1998) (denying motion but cautioning litigant about obligations under the Rule); *Goldberg v. Rainbow Path, Inc.*, No. 96-C6548, 1998 WL 102710, at *6 (N.D. Ill. Mar. 2, 1998) (criticizing counsel for filing six motions in a short period of time, but denying sanctions); *Davis v. Goode*, 995 F. Supp. 82, 93 (E.D.N.Y. 1998) (admonishing counsel to be careful not to relitigate previously decided issues); *Banfield v. UHS Home Attendants, Inc.*, No. 96 Civ. 4850, 1997 WL 342422, at *3 (S.D.N.Y. June 23, 1997) (reminding all counsel of need for strict compliance in the future with the Federal Rules of Civil Procedure and the local rules of the district courts); *Jerkins v. Commissioner*, No. CIV.A.96-0260-CB-S, 1996 WL 604491, at *4 (S.D. Ala. Aug. 6, 1996) (noting government's requests to enjoin plaintiff for filing additional actions and cautioning *pro se* plaintiff against "wasteful litigation tactics"), *aff'd*, 117 F.3d 1432 (5th Cir. 1997); *Divane v. Krull Elec. Co.*, No. 95-C2075, 1995 WL 549053, at *5 (N.D. Ill. Sept. 14, 1995) (denying sanctions motion, stating that some of counsel's arguments "come dangerously close" to violating Rule 11 regarding reasonableness and clarity).

183. *See Whayne v. Dillons Food Store #67*, No. CIV.A.97-2533-EEO, 1998 WL 59474, at *4 (D. Kan. Jan. 20, 1998) (cautioning *pro se* plaintiff about compliance with Rule 11 in the future); *Breedlove v. Sky Bryce Assocs., Inc.*, No. CIV.A.97-0041-H, 1997 WL 760501, at *4 (W.D. Va. Nov. 13, 1997) (admonishing *pro se* plaintiff concerning future suits that assert issues which have been previously decided adversely to his position), *aff'd*, 155 F.3d 557 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1036 (1999); *Antonelli v. Askew*, No. 95-C3007, 1996 WL 131177, at *3 n.5 (N.D. Ill. Mar. 21, 1996) (warning *pro se* litigant against "complaints with shotgun claims for relief in what appears to be knowing disregard of the substantive law").

for whatever reason, do not appear in published services. Second, reported cases do not reveal the behavior of other litigants that may be affected by the amended Rule.¹⁸⁴

Undoubtedly, there are “unreported” violations of amended Rule 11, as would have been the case under the 1983 version. A variety of reasons may explain why. A litigant’s decision not to file a Rule 11 motion may be wholly unaffected by the 1993 amendments to the Rule. Presumably, some litigants do not file Rule 11 motions on principle, while others might decide, for whatever reason, to tolerate violations of the Rule. Such inaction may reflect the litigant’s evaluation that: the violation is trivial, the pursuit of a sanctions motion would not be a worthwhile use of resources, the judge would not take action, or the judge would not rule for the movant.

Critics may assert that the amended Rule’s shift to discretionary sanctions, in combination with the amended Rule’s emphasis on deterrence rather than compensation, results in a situation in which more sanctionable behavior is being “tolerated,” and that Rule 11 motions are not being filed in appropriate situations.¹⁸⁵ On the other hand, that premise could support the opposite conclusion—that the amended Rule is functioning well. First, it would be plausible to argue that the Rule is having a deterrent effect on sanctionable behavior, resulting in fewer potential violations to be resolved. Second, a decline in reported sanctions activity could be attributed in part to use of the safe harbor provision, meaning that putative violators are withdrawing challenged pleadings, resulting in greater “extra-judicial” resolution of violations of the Rule.

One cannot conclude authoritatively that the reported rulings applying the amended Rule will accurately forecast the Rule’s operation in the future, or its broader effect on the federal civil litigation system. Nevertheless, it is reasonable to conclude that the reported rulings accurately depict the current “real world” operation of the amended Rule.

184. An inherent uncertainty is whether rulings that issue sanctions are more likely to be published than rulings where motions are denied or not acted upon. *See Vairo, supra* note 12, at 480 n.33 (indicating that previous surveys showed that “the rate of sanctions may be substantially lower in the unreported cases”). Whether published rulings are “representative” of litigants’ behavior remains debatable. *See Marshall et al., supra* note 12, at 944 & nn.3, 4 (noting that judicial opinions do not aid the assessment of how common Rule 11 activity is, do not provide data on how Rule 11 affects day-to-day practice, and do not provide information on the apportionment of sanctions among the types of litigants because certain categories of cases may be reported more often than others).

185. *See supra* notes 89-97 and accompanying text.

V. USING THE AMENDED RULE EFFECTIVELY IN ACTUAL PRACTICE

Although the amended Rule is not a radical departure from the 1983 version, its new provisions warrant close review by litigants in order to use the Rule effectively in appropriate cases and to reduce their own potential exposure to sanctions. The reported decisions that apply the amended Rule can provide some assistance to practitioners so that they can develop case strategy with the amended Rule in mind. Provided below are some observations on how the amended Rule can be used effectively and consistently with its objectives.

A. *The Safe Harbor and Separate Motion Requirements*

The safe harbor and separate motion provisions can be a pitfall for the unwary.¹⁸⁶ The initiator of the Rule 11 motion must lay careful groundwork in anticipation of its court filing. The Rule 11 motion must be separate and distinct from any other motion or filing.¹⁸⁷ The Rule 11 motion also must be served, not filed, so that the twenty-one day safe harbor period is “triggered.”¹⁸⁸ The “separate motion” requirement makes the preparation of a Rule 11 motion more “laborious,”¹⁸⁹ but the reported decisions indicate that courts will be very strict in insisting upon compliance with this requirement.¹⁹⁰

Timing is a critical component in the safe harbor and separate motion provisions.¹⁹¹ If counsel believes that the Rule has been

186. See *supra* notes 135-39 and accompanying text.

187. See FED. R. CIV. P. 11(c)(1)(A) (“A motion for sanctions under this rule shall be made separately from other motions or requests . . .”).

188. See FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 146 F.R.D. 583 (1993) (stating that Rule 11 motions must not be filed until at least 21 days after being served so that a party has the opportunity to correct the alleged violation).

189. See Cutler, *supra* note 82, at 286 (arguing that litigants will eventually be dissuaded from seeking sanctions because of the 1993 amendment).

190. See *supra* note 138 and accompanying text. One court has ruled that sanctions under Rule 11 were unavailable because the safe harbor requirement was not met, but that attorneys’ fees were properly assessed under 28 U.S.C. § 1927. See *Ridder v. City of Springfield*, 109 F.3d 288, 297 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 687 (1998).

191. As the Advisory Committee’s Notes indicate, although the proper timing of a Rule 11 motion is to be resolved on a case-by-case basis:

Ordinarily the motion should be served promptly after the inappropriate paper is filed and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery.

Given the safe harbor provisions . . . a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 590 (1993); see also *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1137 (W.D. Mich. 1996) (denying sanctions motion as premature given the stage of the case); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 857 F. Supp. 1241, 1244 n.4 (N.D. Ill. 1994) (deferring ruling to summary judgment stage where the sanctions issue would be more appropriately addressed); *Hoai v. Vo*, No. CIV.A.89-239L-LFO, 1995 WL 379694, at *5 (D.D.C. June 16, 1995) (denying both parties’

violated, the safe harbor provision must be invoked and the motion filed promptly after expiration of the twenty-one day period.¹⁹² There have been a number of recent cases where litigants withdrew the pleading (e.g., dismissing a challenged complaint) prior to the movant satisfying the Rule's procedural requirements.¹⁹³ In those situations, courts have denied the Rule 11 motion.¹⁹⁴

B. Giving Notice and Documenting a Violation

The movant should clearly inform the opposing litigant as to the nature and specifics of the Rule 11 violation and document the factual and/or legal deficiencies in the filings of the violator.¹⁹⁵ The

sanction motions due to long passage of time since the conduct at issue); *Forcucci v. U.S. Fidelity and Guar. Co.*, 153 F.R.D. 484, 486-87 (D. Mass. 1994) (denying request for attorneys' fees because motion was not filed within a reasonable time).

192. See *Pendleton v. Central New Mexico Correctional Facility*, 184 F.R.D. 637, 640 (D.N.M. 1999); *Powell v. Squire, Sanders & Dempsey*, 990 F. Supp. 541, 544 (S.D. Ohio 1998) (holding that the new language of Rule 11 does not require the motion to be filed prior to entry of judgment and therefore, the safe harbor provision was properly invoked although the motion was filed after dismissal); *Tannenbaum v. Baxter Healthcare Corp.*, No. 95-C7051, 1996 WL 327994, at *6 (N.D. Ill. June 12, 1996) (holding that the safe harbor did not protect plaintiff who, at a settlement conference offered to submit a dismissal of the suit, but who did not file formal notice of voluntary dismissal until his response to the Rule 11 motion); see also *Arends v. Mitchell Savs. Bank*, No. 97-C4078, 1997 WL 754118, at *2 (N.D. Ill. Nov. 21, 1997) (rejecting argument that alleged violator had not received safe harbor motion, noting ordinary rule that service is effective upon mailing); *Duggan v. Everd*, No. CIV.A.93-2740, 1995 WL 283724, at *1 & n.2 (D. Md. May 11, 1995) (noting that the 1993 amendments do not foreclose the court from issuing a show cause order after the close of the case), *aff'd in part and vacated in part*, 81 F.3d 149 (4th Cir. 1996) (holding that the district court could not issue show cause order to award fees under Rule 11(c)(2)).

193. See *supra* note 191.

194. See *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528-29 (10th Cir. 1997) (affirming denial of sanctions where defendant did not move for Rule 11 sanctions until after plaintiff had already moved to dismiss his claims); *Daliessio v. DePuy, Inc.*, 178 F.R.D. 451, 452-53 (E.D. Pa. 1998) (holding that a movant's use of safe harbor procedure does not excuse the filing of a Rule 11 motion after judgment of dismissal under Third Circuit's supervisory rule that all Rule 11 motions must be filed in district court prior to entry of final judgment); *Hockley v. Shan Enters., Ltd.*, 19 F. Supp. 2d 235, 240 (D.N.J. 1998) (holding that defendant is not subject to Rule 11 sanctions because it withdrew its position when it voluntarily dismissed claims against a third party defendant, regardless of the fact that original defendant had no evidence to support its allegations); *Cannella v. Anodyne Corp.*, No. 95-C1012, 1997 WL 573398, at *5 (N.D. Ill. Sept. 11, 1997) (denying a motion for sanctions that was filed four months after court's initial ruling on liability and noting that plaintiff had served safe harbor warning almost two years before he filed his motion); *Progress Fed. Sav. Bank v. Lenders Ass'n, Inc.*, No. CIV.A.94-7425, 1996 WL 57942, at *2-3 (E.D. Pa. Feb. 12, 1996) (holding that although movant had given safe harbor notice, plaintiff dismissed suit before motion was filed and therefore, the motion for sanctions was untimely filed).

195. The served and filed versions of the Rule 11 motion also should be identical to avoid confusion and to preclude any claim of prejudice. See *W.W. Adcock, Inc. v. Fort Wayne Pools, Inc.*, No. CIV.A.95-3565, 1997 WL 805201, at *4 (E.D. Pa. Dec. 18, 1997); *ERG, Inc. v. Stern*, No. 94-C3729, 1996 WL 131743, at *1 (N.D. Ill. Mar. 11, 1996) (denying motion for sanctions and noting that the filed version contained allegations of Rule violations not included in the version served one year earlier in accordance with the safe harbor provision of Rule 11(c)(1)(A)). Counsel also will need to consult local rules to determine how to submit the motion. See *Morroni v. Gunderson*, 169 F.R.D. 168, 172 (M.D. Fla. 1996) (denying motion because movant

specific subsection of the Rule that has been violated should be cited. The prospective movant should be specific as to the nature of the violation it seeks to remedy when it invokes the safe harbor procedure. If counsel provides such detail, that effort will be effective groundwork for the subsequent motion and will facilitate the court's review of the sanctions controversy.¹⁹⁶ Specificity, therefore, serves dual purposes—it puts the offender on notice of the specific errors of fact or law asserted in its written papers, and it provides the court with a clear path to its ruling on the motion. To the extent counsel does not set out its case in advance, the risk increases that its motion will be denied. A motion can be rejected outright if the violator has not been put on sufficient notice of the deficiencies, or if Rule 11 has not been specifically invoked as the remedy for failure to withdraw the paper.¹⁹⁷

C. *Specificity in Pleading*

From the vantage point of the litigant who files a pleading, motion, or other paper, he or she should clearly state the allegations of fact or contentions of law that might be subject to later challenge under the Rule. To the extent that a factual allegation must be pleaded in an indefinite way, such as due to a lack of access to supporting documentation or to other corroboration, counsel will want to identify the contention accordingly, as Rule 11(b) contemplates. Counsel should specifically state that discovery will be needed to substantiate a contention. If later challenged on this point, counsel will want to be able to support the reasonableness of its pre-filing investigation.¹⁹⁸

In advancing legal contentions consistent with Rule 11(b)(2),

failed to comply with local rules requiring pre-filing consultation with opposing counsel).

196. A number of court opinions contain detailed descriptions of "safe harbor correspondence." See, e.g., *Gray v. Millea*, 892 F. Supp. 432, 438 (N.D.N.Y. 1995) (discussing defendant's pre-motion letter "outlining legal and factual flaws in plaintiff's claims"); *Gibson v. City of Alexandria*, 855 F. Supp. 133, 136 (E.D. Va. 1994) (discussing series of three letters written by defense counsel to plaintiffs' counsel asking them to dismiss their claims).

197. See *Weiss v. Weiss*, 984 F. Supp. 682, 685 (S.D.N.Y. 1997) (holding that defendant failed to use safe harbor provision and failed to identify deficiencies under Rule 11); *Leistikow v. Mangerson*, 172 F.R.D. 403, 406 (E.D. Wis. 1996) (denying motion where defendants failed to identify basis for Rule 11 claim); *Brown v. Pierce Mfg., Inc.*, 169 F.R.D. 118, 119-20 (E.D. Wis. 1996) (denying sanctions where defendant failed to serve former plaintiff with motion 21 days before plaintiff voluntarily dismissed complaint and where defendant did not identify which subsection of Rule 11 plaintiff had violated).

198. Cf. *Sprague Farms, Inc. v. Providian Corp.*, 929 F. Supp. 1125, 1130-31 (C.D. Ill. 1996) ("Rule 11(b)(3) is not a license to allege facts first and then investigate. Instead, Rule 11(b)(3) is designed as a safety valve for parties who must plead certain facts, but cannot confirm them before pleading because an adversary controls the information necessary to substantiate these claims.").

counsel will want to consider the Advisory Committee's comment that arguments for the extension or modification of existing law be specifically identified in pleadings or other written papers.¹⁹⁹ Although the mere identification of such arguments does not insulate the pleading from challenge, such specificity can be important.²⁰⁰ As the Fifth Circuit recently observed, in affirming an award of sanctions under the 1983 version of the Rule:

Rule 11 is not intended to stifle creative advocacy or to chill an attorney's enthusiasm in pursuing factual or legal theories. . . . But just as not every combination of chords constitutes a song, not every argument that the law should be otherwise counts as creative advocacy. [Counsel's] pleadings do not argue for the modification of the law of limitations; they do not suggest novel legal theories or a creative interpretation of a changing area of the law. The claims either rest on poor legal research, bad faith, or both. To say the least, the district court did not abuse its discretion in reprimanding [counsel] on this point.²⁰¹

D. Once a Paper is Challenged

After a litigant is served with a Rule 11 motion, the safe harbor provision gives the litigant an opportunity for re-examination of the challenged motion or pleading, and if appropriate, to withdraw it.²⁰² Counsel should promptly enlist a "second opinion" by other counsel in his or her firm or organization, preferably a more senior attorney or supervisor, who can evaluate the challenged pleading with more neutrality, and make an informed decision on whether to withdraw it. The reviewing attorney has a direct stake in resolving the issue correctly due to his or her own potential accountability for a Rule 11 violation. Counsel's review should be prompt and thorough, particularly because the safe harbor period allows only twenty-one days for review before the Rule 11 motion is filed.²⁰³ The Rule does not preclude the movant or the court from shortening that time

199. See *supra* notes 38-39 and accompanying text.

200. See *Arons v. Lalime*, 3 F. Supp. 2d 314, 327 (W.D.N.Y. 1998) (denying defendants' Rule 11 motion and holding the allegations and other factual contentions had evidentiary support or were likely to have such support after a reasonable opportunity for further investigation).

201. *Merriman v. Security Ins. Co. of Hartford*, 100 F.3d 1187, 1194 (5th Cir. 1996) (citations omitted).

202. See FED. R. CIV. P. 11 (c) (1) (A).

203. Neither the Rule nor the Advisory Committee's Notes addresses whether counsel can request the opposing party to extend the 21-day period, although nothing in the Rule appears to preclude such a request, and by its terms (i.e., "or such other period as the court may prescribe") the Rule suggests that there should be such flexibility. See *id.* At the same time, however, nothing therein suggests that the proposed movant must grant such a request, or that a court must do so over the movant's opposition. See *id.*

period.²⁰⁴

If the decision is made to maintain the challenged position, the alleged violator must prepare its opposition to the motion. Analysis conducted during the safe harbor period should establish a firm basis for the opposition. Counsel will want to exercise particular care in responding to the motion, because that response is their opportunity to persuade the court that Rule 11 has not been violated. If, on the other hand, the decision is made to withdraw the pleading or paper that decision should be communicated to the other side promptly, so that the twenty-one day period does not expire and “open the door” to a Rule 11 motion.

E. The Court's Review of the Rule 11 Motion

When the sanctions motion is presented to the court, each party will evaluate how the motion should be decided on the papers or after some form of hearing. Local rules and practice may dictate whether and how the motion is placed on a hearing calendar. A hearing may be appropriate if there are complicated issues, such as factual disputes, to resolve. If a hearing is proposed, the party will need to evaluate the credibility of any prospective witnesses and, for example, whether counsel themselves might be called to testify.²⁰⁵

The movant also should be specific in any request for fees, identifying what fees and expenses have been incurred “as a direct result of the violation,” as required by Rule 11(c)(2).²⁰⁶ The fees request must be well documented, as the court may scrutinize requests for substantial amounts of fees.²⁰⁷ Depending upon local rules or practice, that documentation might have to accompany the Rule 11 motion. Otherwise, counsel will need to prepare its fee application for presentation to the court promptly after the sanctions ruling.

204. See *Revson v. Brod*, No. 96 Civ. 5608, 1997 WL 317369, at *1 (S.D.N.Y. June 12, 1997) (shortening the time for plaintiff to respond to Rule 11 motion after defendant raised the sanctions issue); *Stevenson v. Employers Mut. Ass'n*, 960 F. Supp. 141, 144 (N.D. Ill. 1997) (shortening time to 10 days); cf. *Wright v. Wilson, Elser, Moskowitz, Edelman & Dicker*, No. 95 Civ. 7970, 1996 WL 447773, at *2 (S.D.N.Y. Aug. 8, 1996) (mem.) (discussing plaintiff's motion, filed before the mandatory 21-day period elapsed, but defendant had already responded to the served motion within that period).

205. It is beyond the scope of this Article to discuss the potential attorney-client privilege issues that could arise if counsel's defense relies upon the client for asserting certain contentions. See *Davis v. PRC, Inc.*, 161 F.R.D. 326, 328 (E.D. Va. 1995) (noting that two of the subject attorneys did not testify at sanctions hearing despite client's waiver of attorney-client privilege).

206. See FED. R. CIV. P. 11(c)(2).

207. See, e.g., *Zuk v. Eastern Pa. Psychiatric Inst.*, 103 F.3d 294, 301 (3d Cir. 1996) (remanding award of \$8,750 in fees to the district court, stating that the amount “may be contrary to the current spirit of Rule 11”).

If the court decides that Rule 11 has been violated, and then determines what kind of remedial order it should issue, counsel may have another opportunity to argue for appropriately tailored sanctions, consistent with Rule 11(c)(2)'s prescribed limits—"what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated,"²⁰⁸—and the guidance set forth in the Advisory Committee's Note.²⁰⁹ For the movant, this may mean the recovery of some attorneys' fees and the possible imposition of other remedies. In contrast, the violator presumably will argue that an admonishment, reprimand, or similar sanction will be appropriate, rather than a fine or payment of fees.

VI. A PRELIMINARY ASSESSMENT OF THE AMENDED RULE

A. *The Amended Rule's Direct Effects*

Whatever the merit of the various criticisms that have been directed at the amended Rule, those criticisms must be weighed against the amended Rule's offsetting benefits.

First, the amended Rule should lead to greater care in the filing or submission of pleadings and other papers by which litigants certify that they have a reasonable basis in law and fact to assert specific claims. Because Rule 11 now extends beyond the individual signer of pleadings to law firms and other legal organizations, there is more accountability for alleged violations and opportunity for review of those violations by individuals who may be more objective than the original signer. The safe harbor will impress upon the alleged violator the need to scrutinize the challenged pleading. Thus, the amended Rule provides at least the potential for reducing the number of frivolous pleadings, if not some frivolous cases.

Second, the amended Rule, in part due to the safe harbor and separate motion requirements, should eventually reduce "satellite" litigation, and correspondingly, the resources of courts consumed in ruling on Rule 11 issues.²¹⁰ Although there has been no empirical investigation to date of this hypothesis, the anecdotal evidence

208. FED. R. CIV. P. 11(c)(2).

209. See FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 501, 587 (1993) (identifying possible sanctions the court may impose for violations such as: striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminar or other educational programs; ordering a fine payable to the court; and referring the matter to the proper disciplinary authorities).

210. See Cutler, *supra* note 82, at 286-87 (noting extensive time judges spend on Rule 11 sanctions); Hedican, *supra* note 82, at 1007 (predicting fewer Rule 11 motions in employment litigation).

suggests that there should be such a reduction.²¹¹ Additionally, to the extent that litigants file Rule 11 motions in order to shift litigation costs, the amended Rule's emphasis on deterrence should dissuade the filing of some motions.²¹²

Third, the amended Rule should encourage the assertion and pursuit of claims in which litigants argue for an extension, modification, reversal of existing law, or the establishment of new law.²¹³ The certification required for the filing of papers may yield a more sophisticated evaluation of counsel's responsibility to assert claims in *objective* good faith. Permitting the assertion of a claim or defense based upon a reasonable pre-filing investigation is preferable to a party asserting an unqualified, inaccurate denial, or forfeiting a potential claim or defense through an overly rigid application of the certification rule.²¹⁴

The amended Rule has two other advantages over its predecessor. To the extent that sanctions orders are non-compensatory, whether in the form of fines payable to the court or by imposing other remedies,²¹⁵ the Rule will function more as an explicit deterrent to frivolous filings. Reducing the mercenary incentives of the Rule also may reduce the level of animosity and incivility among counsel that is inevitably triggered when a Rule 11 motion is filed.²¹⁶ But the hardening of positions that often accompanies protracted litigation may not be softened much by amended Rule 11, although the safe harbor is one way for a party, albeit under the pressure of a potential sanction, to withdraw a contention, and thereby possibly reduce the

211. See Duncan, *supra* note 105, at 12 (discussing research conducted on Westlaw by the law firm of Jenner and Block).

212. See Cutler, *supra* note 82, at 268 (arguing that the 1993 amendment, with a permissive standard for imposition of sanctions, coupled with its limits on monetary sanctions, will counteract the financial disincentives that parties with limited resources faced under the 1983 amendments).

213. See *id.* at 267-68 (discussing the likely result of decreased Rule 11 litigation due to the altering of the sanctioning process and the safe harbor provision).

214. Cutler implies that this flexibility in pleading could encourage unwarranted discovery in an improper attempt to locate facts to confirm the initial assertion. See *id.* at 281. But even qualified statements of fact are subject to Rule 11, and can be challenged.

215. See *supra* notes 159, 171-75 and accompanying text.

216. Some courts view the safe harbor provision as a means of improving communication and civility. See *supra* notes 136-38 and accompanying text. It could also be argued that service of a proposed Rule 11 motion signifies a serious breach in the relationship between the parties. The safe harbor provision thus would be viewed simply as a procedural hurdle to be vaulted before sanctions are imposed. But to the extent the provision permits the negligent practitioner to retreat gracefully once confronted with a serious error, that experience may be chastening and educational. The safe harbor is not dissimilar to other features of the amended Rules, see FED. R. CIV. P. 26(f), 37(a)(2)(A), (B), which require consultation before the filing of motions, the objective being to reduce formal disagreement and the need for judicial intervention. See Schwarzer, *supra* note 104, at 21.

level of combativeness in the case.²¹⁷

B. The Amended Rule and the Rules Process

Experience to date with the amended Rule also provides some lessons as to the amendment process for civil procedure rules, in general. First, experience under the amended Rule suggests that the Federal Rules of Civil Procedure can be reformed and improved, even if substantial changes are made to them. The 1993 amendment was the product of considerable debate, as well as almost a decade of experience under the 1983 version. It was debated in the context of extensive commentary over the Rule's objectives, and how those objectives were advanced, or thwarted, when applied by the courts.²¹⁸ As one commentator observed, the 1993 amendments "were the result of a thoughtful and elaborate process by the Advisory Committee to rid the Federal Rules of the excesses and inequities of mandatory sanctions but at the same time assure that Rule 11 would continue to function effectively as guarantor of the integrity of pleadings and other filings in federal courts."²¹⁹

In addition, the amended Rule is not a radical departure from its predecessor, but an effort to restore Rule 11 to its original purposes. It, therefore, can be distinguished from the far more controversial disclosure rules that were issued at the same time.²²⁰ The experience to date indicates that Rule 11 can address abuses of the civil litigation process without undue disruption of established practices. That experience also indicates that a reasonable balance can be struck, consistent with the Rule's objectives, between the competing interests of a litigant's accountability to the court, and counsel's duty of zealous advocacy on behalf of clients and counsel's interest in receiving due process in the levying of sanctions.

But just as the amended Rule strikes a new balance, it has not addressed several important, overriding issues. There continues to be a debate over whether the Rule is unduly harsh in imposing an

217. There are many court- or bar-sponsored initiatives to promote civility in the bar; the adversarial nature of sanctions proceedings is simply one element of the problem. *See* Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n, 121 F.R.D. 284, 286-89 (N.D. Tex. 1988) (en banc) (adopting standards of litigation conduct for civil cases); Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 299-300 (1996) (noting support for safe harbor); Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 208 (1994) (discussing the history of contempt proceedings instituted against attorneys for incivility); District of Columbia Bar Association, *D.C. Bar Voluntary Standards for Civility in Professional Conduct* (visited Oct. 10, 1999) <http://www.dcbbar.org/attorney_resources/task.html>.

218. *See supra* notes 12-17 and accompanying text.

219. Cavanagh, *supra* note 8, at 385.

220. *See supra* notes 128-31 and accompanying text.

objective standard on litigants' behavior.²²¹ Some commentators also criticize the standard for appellate court review of sanctions rulings, which generally has been an "abuse of discretion" standard.²²² The protracted debate over Rule 11, and the large volume of case decisions applying it, indicates that sanctions issues will continue to engage courts and litigants.

CONCLUSION

Amended Rule 11 has substantial implications for federal civil practice. As courts and litigants become more familiar with its operation, there is reason to believe that it will fit more closely within the central objective of the Federal Rules, as described in Rule 1, to "secure the just, speedy, and inexpensive determination of every action."²²³

221. See, e.g., Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 717 (1996) (arguing that the courts' regulation of Rule 11 is viewed from an objective standard, i.e., what a "reasonable attorney" would have done, and not simply from the perspective of the court); Vairo, *supra* note 12, at 488-90 (discussing the appellate standard of review). As one commentator has observed about the debate over the Rule's deterrent purpose:

[T]he sanctions debate is a distributional political battle that has some unavoidable aspects of a zero-sum game. If Rule 11 is written or interpreted stringently, some claims are sacrificed in the name of efficiency, deterring the unfounded or abusive, and thinning court dockets. If Rule 11's text or application is made more forgiving, some of these values are sacrificed in favor of zealous advocacy, innovative lawyering, and claimants' rights. Because some lawyers tend to favor the access/advocacy/innovation goals while others prefer the efficiency/expense/deterrence goals, no theory of Rule 11 can hope to satisfy all sides of the sanctions debate completely.

Stempel, *supra* note 12, at 260-61 (citation omitted).

222. See Armour, *supra* note 221, at 781 (suggesting more intensive appellate court review of sanctions rulings); Cavanagh, *supra* note 8, at 395 (criticizing the Supreme Court's holding in *Cooter & Gell*, which established the abuse of discretion standard); Johnson et al., *supra* note 98, at 672 ("More vigorous appellate review is the *only* mechanism available to police possible abuses of the rule."); Lazaroff, *supra* note 104, at 5 (expressing concern about abuse of discretion standard and suggesting that district judges have too much leeway in their decisions); Vairo, *supra* note 12, at 488-90 (criticizing the abuse of discretion standard); Vairo, *The New Rule 11*, *supra* note 104, at 85-87 (concluding that "on balance, the 1993 amendments are a positive step forward," but noting concerns about application of abuse of discretion standard and continued pressure to seek attorneys' fees); see also *Bilharz v. First Interstate Bank of Wis.*, 98 F.3d 985, 989 (7th Cir. 1996) (holding that because Rule 11 sanctions have an impact beyond the immediate case and affect professional reputations, the abuse of discretion standard does not mean that the court of appeals gives complete deference to the district court's ruling).

223. FED. R. CIV. P. 1.